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THE SPECIAL LAW GOVERNING

# PUBLIC SERVICE CORPORATIONS

AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT

BY

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PROFESSOR OF LAW IN HARVARD UNIVERSITY

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TO

JOSEPH HENRY BEALE, A.M., LL.B., LL.D.

CARTER PROFESSOR OF GENERAL JURISPRUDENCE IN
HARVARD UNIVERSITY

Since with characteristic generosity he will
not permit his name to be upon the

TITLE-PAGE

With deep gratitude
I inscribe
THIS DEDICATION

# PREFACE

I have felt for many years that the distinction between the private callings—the rule—and the public callings—the exception—was the most striking feature of the law governing business relations. The causes of the division are economic rather than strictly legal. Free competition, the very basis of the modern social organization, superseded almost completely mediæval restrictions, but it has just come to be recognized that the process of free competition fails in some cases to secure the public good, and it has been at last admitted that some control is necessary over such lines of industry as are affected with a public interest. At this point the problem of public callings becomes a legal one.

From the earliest times some restraint has been exercised over such lines of industry as are of vital interest to the public. The establishment of the peace, the protection of the weak against the physical violence of the strong, is a fundamental function of government; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful. In matters not vital to the life and well-being of mankind the laws of society may be left free to operate, without limitation by the sovereign power; but in all that has to do with the necessaries of life the protection of the sovereign is extended. The modern State protects equally against physical violence and against oppression that affects the means of living.

As a result of that economic evolution from mediæval

times to the present day which I have sketched in my first chapter, there have come into being in the last generation a considerable number of employments which have gained, if not a legal monopoly, at any rate, as a result of circumstances, a virtual monopoly in matters of public necessity. The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our State, that the admission has been made with much hesitation that State control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail, for in conditions of virtual monopoly, without stern restrictions, there is always great mischief.

The spirit of our present age demands that the great business enterprises shall be conducted in accordance with the requirements of society. The present programme of organized society is to see to it that those who have gained a substantial control of their market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action may, even in the industrial world, work injuriously for the public, and it must then be restrained in the public interest. We have seen the results of unrestrained power; and we no longer wish those who have control over our destinies left free to do with us as they please. Liberty does not mean to men at the beginning of the twentieth century what it meant to men at the beginning of the nineteenth century.

While State regulation is the prevailing philosophy of the people at the beginning of the twentieth century, it must be borne in mind that this has been the result of a gradual progress of thought, and that this progress has not

affected all men equally. Now, as at all times, there are conservatives and radicals, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been those who have been unable to appreciate the change; and in every such change there have been those who are unable justly to estimate the true meaning of the change. We have, therefore, three general types of thought at every time: the conservatives, the moderates and the radicals. And this is as true of legal as of economic thought. Many lawyers still hold conservative views as to the application of the law of public callings to modern conditions. They believe that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes.

It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. In recent times there undoubtedly is an increasing need of this stricter regulation of all employments which appear to be affected with a public interest. The most of men appreciate that the law has already taken control of the situation for all time. It is hardly too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation; and it must be met without further hesitation. Great power brings as its consequence the need of control of that power for the good of the whole people.

In this crisis of affairs the people must be assured that

the law is adequate to deal with the situation, that it has not only elaborated detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified, which are truly inconsistent with public duty. That those who profess a public employment owe the utmost public service should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is not even an enlightened selfishness.

The time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of present conditions. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. The proprietors of the public services should be told sharply that they may not adopt to the prejudice of their public various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

This principle of State control does not lead one to socialism; indeed, it saves one from socialism if truly understood. It is only in those few businesses where the conditions are monopolistic that dangerous power over their public has been attained by those who have the control. In most businesses the virtual competition which prevails puts the distributors at the mercy of their public.

In current opinion the recognition of this distinction is manifest. Men are as eager for an open market as ever; but they wish the control of monopoly to insure it. The demand is for freer trade where competition prevails and stricter regulation where monopoly is found. So long as virtual competition prevails there is no necessity for coercive law since there is then no power over the purchasing public. But where in any business virtual monopoly is permanently established the people will not be denied in their deliberate policy of effectual regulation of such public services for the common good.

Only to this extent the individualistic ideal of society gives place to the collectivist policy. It is with true appreciation of the real issue that we are contending for State control to gain individual liberty. It may once have been the ideal of industrial freedom that a man might do as he pleased with his own; in any event that is no longer our notion of social justice. It is believed now that with increase in power over the particular market comes increase in responsibility to the dependent public. Socialism would destroy all private interests in the name of the public; regulation would preserve private interests by reconciling them with public right. Socialism attacks all capital to whatever business it is devoted; regulation grapples with monopoly only when it is convinced that there is no other way to safeguard the interests of the public.

There is now fortunately almost general assent to State control of the public service companies. Two ways only can be found to exercise such control. One way, that advocated by the most radical statesmen, is the government ownership and operation of these services. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the utilities for the public good. One or the other of these

methods must be finally adopted. The conservative method is now on trial. It behooves the lawyers to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership. The belief that this duty has, almost without warning, been thrust upon the profession, and that the lawyer has not been at all prepared by his training to solve the difficult questions that may arise, has led the author to publish this treatise, with the hope that it may help the profession to meet its new and perplexing problems.

No one can carefully study the authorities on this subject without feeling that we are just entering upon a great and important development of the common law. What branches of industry will eventually be of such public importance as to be included in the category of public callings, and to what extent the control of the courts will be carried in the effort to solve by law the modern economic problems, it would be rash to predict. Enormous business combinations, virtual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of the law of public callings. These doctrines are not yet clearly defined. General rules, to be sure, have been established, but details have not been worked out by the courts; and upon the successful working out of these details depends to a large extent the future economic organization of the country. Only if the courts can adequately control the public service companies in all contingencies may the business of these companies be left in private hands.

All businesses both public and private are subject, to be sure, to that general police power of the State whereby in any civilized society the effort is made to so order things

that one may not use his own so as to injure another. But the comparison of the large amount of regulation which it is considered proper for the State to impose in regard to public services with the small amount of regulation which it is considered proper for the State to enforce in regard to private business is in itself significant enough. The difference which is shown is more than one of degree, it becomes one in kind. It is only in public business that the law imposes affirmative duties; generally speaking the duties imposed upon those in private business are negative. The law says to those in public business you must do this for this applicant, and you must do it thus. To those in private business it says you must not do this, or if you do this you must do it thus. This is the chief distinction between public calling and private calling.

It is in the firm belief that the law governing the public services will prove upon analysis to be a unified body that the author has been at work for many years, and this first treatise upon the subject has been written. General principles will be developed throughout the work and corrollaries to them established by the use and with the co-ordination of cases from a variety of public employments. Not only are the fundamental principles true as to all public employments—that all must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made. But also in dealing with the minor detail of these principles, cases from one service will be found in point in another—as to what conditions there are precedent to service, what will excuse failure in provision of facilities, what is a proper basis for calculating rates and what differences constitute discrimination. This is the way our law grows, by breaking down the partitions between departments of the law which have been built up separately.

The public service law has at length reached a stage of

development in which it may be possible to state its principles with some degree of confidence. It is only within the last few years that it would have been within the range of possibility to do this. Twenty-five years ago the public services that were recognized were still few, and the law as to them imperfectly realized. It was known from olden times that those who professed a public employment must serve all at a reasonable rate. As to the duty to serve, it was recognized that there were certain excuses. As to the restriction to reasonable rates, there was no standard unless, indeed, the customary charge. But the important duty to provide adequate facilities had hardly advanced beyond the general law as to negligence. And the duty not to discriminate, which according to present ideas is the most important of all, was denied altogether by the weight of authority.

Even ten years ago when these four obligations had become generally recognized, the details as to them in regard to any particular employment had been worked out only in very fragmentary manner; but at the present day it is just being appreciated that rapid progress may be made by the general recognition of the unity of the public service law, whereby cases as to one calling may be used to show the law in all. This treatise is based upon this method. But it is only in our present day that the attempt to treat the public service law as a consistent body of law could be made with any hope of success. As it is the law of public service is not much further developed than that of sales was two centuries ago.

As time goes on, I am finding myself almost among the conservatives in standing by the original program for State control. It is still my belief that the State should as far as possible confine itself to regulation, leaving the companies to work out their own problems of management. State control need seldom go further than regula-

tion in this sense. Whatever the companies may do should be subject to immediate revision by the constituted authorities. There should be swift reparation provided for any individual who has suffered harm in the meantime. And that should be the full extent of governmental regulation, generally speaking. When the State goes further, and attempts to dictate as to the policies which the companies shall adopt, it usually goes too far. Legislation going to this extent really crosses the line which divides State control from State operation. The next step would be government ownership with its unknowable consequences. I feel, therefore, that the restriction which the Federal Government has thus far put upon itself in regulating interstate carriage is well advised. The Interstate Commerce Commission still has virtually only the power of revision. In some of the States, however, the Commissions are virtually given the power to determine of their own motion what the carrier shall do for the public. This imposes government operation, without relieving the railroad from its responsibilities in any way.

This does not mean that everything shall be left to the discretion of the companies, as the conservatives claim. Discretion should be left to the companies, but it should be made clear that this discretion may be abused. Although the companies should be left as free as possible to work out their own problems within the law, they should be warned that they must not go outside the limits which the law is fixing. For example, the railroad people once claimed the right to make such rates as it seemed to them would be for the best interests of all concerned. But so long as this power is left in the hands of the railway management without power of review by any authority upon any fundamental principle, it is in the hands of the railroad officials to build up an artificial market where the natural conditions are adverse, or to turn an industrious

city into a wilderness again. It is believed that these are too great powers to intrust to private hands without governmental control based upon some recognized standards. Indeed the public law in this, as in the other cases, should put sufficient limitations upon any business policy, however profitable, which comes in conflict with the fundamental principle of equal service to all.

The whole problem of the regulation of public utilities has been seen more steadily of late years. It has been appreciated that in dealing with a public service company the State is really dealing with a private business concern, however many the obligations may be which it owes to the public. The risks its proprietors run are such that their financial management should be left to them, unless they be shown to be taking profit with outrageous disregard of their public obligations. With these broader views, it would be surprising if more consideration were not paid to the rights of the owners of public services. Perhaps for the moment there is danger that in emphasizing their duties, their rights may be forgotten. Except in the most highly developed communities public service has certain risks even as compared with private business, besides its obvious advantages. Public services must run whatever the times; and their fate is linked with that of the community. They are engaged in a business with the ordinary incidents of a business, with some of the hopes and hazards of a business.

That the courts are approaching this great issue of State control with the enlightened policy of fair compromise of conflicting interests is plain. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with great caution. The courts ought not to bear

the whole burden of saving property from confiscation. The legislative bodies ought to do their part. Our social system rests largely upon the basis of private property, and that community which seeks to alter this will soon discover its error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations is as nothing compared with his share in the ruin of which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. With these the views of the United States Supreme Court it would seem that the present crisis may be faced with confidence.

Much that I have just written I have said in this book and elsewhere; but I thought it might make clearer my point of view to my readers if I brought the argument to a focus here, at the outset. Personally I have no inclination to paraphrase what I have said formerly in one place when I wish to say the same thing in another connection, for fear that the repetition may be pointed out. As it happens, many topics in this book could be identified in other writings of mine upon this general subject. But in reality this treatise was largely written before these publications—not since. I wrote out the general scheme of this treatise about ten years ago and I have been using it as the basis for class discussion since, so that I have had the incalculable advantage of discussing this scheme with thousands of fellow students. From time to time I have finished off various chapters as contributions to various magazines, and here again I have had the great advantage of intelligent criticism. I should not in this preface have pointed this out, had it not been that I felt that I owed it to myself to explain why certain portions of this treatise have been in print before. In particular I thought it was only fair to say that most of what has been

apparently taken from Beale and Wyman on Railroad Rate Regulation was the part I contributed to that work from my draft for this treatise, which I had already in hand five years ago at the time we were writing that book. In the next edition of the Railroad Rate Regulation we shall omit most of this matter, confining ourselves to commentary upon the current legislation, Federal and State. The general principles of the public service law are now well enough understood, so that the inclusion of this general matter will be unnecessary.

For my general scheme, which I have been working over so long I can, therefore, offer no apology; indeed, I am not ashamed of the general analysis of this new division of the law. For the detailed execution, however, I must offer the usual excuses; for I have been too busied in my profession to give to this work all the time I could have wished. Some portions of the subject have perhaps interested me more and got in consequence greater care. I have had a policy of a sort in writing the text, however. Where I have been dealing, as in the first third and the last third of the treatise, with the new law of public service, I have cited all the cases I could find and given constant quotations from the decisions, so as to show that I was stating the law as it was, not as I was imagining it to be. In the middle third of the treatise I have dealt with much more familiar law, which I have summarized as briefly as I could, citing only such cases of the thousands I have handled as I thought would be of the greatest use. In the last few months I have hurried the whole work to conclusion as one will, feeling that I wanted to have what I had to say read while the law was in the making. For those who can realize by experience the labor of writing and putting through the press a work of this size and scope its errors and omissions will appear not unnatural or altogether inexcusable. I feel, however, that nothing of the sort will

be so serious as to obscure the meaning of the text, and that the practical usefulness of the book will not be affected. In regard to the revision of the citations I have been fortunate in having this painstaking work done, with the exception of a few chapters when the printer was pressing us, by Miss Helen Thompson, the expert assistant to the Faculty of the Law School in the writing of our books. Not only has she taken charge of that very difficult part of modern bookmaking, the extension of the citations, but she has been of great assistance to me in many things outside of this feature of the work. Further I should acknowledge considerable aid in writing certain chapters from my brother-in-law, Albin L. Richards, Esq., of the Boston Bar. But most of all I would express my great gratitude to my colleague, Professor Joseph H. Beale, whose wise counsel has been my constant inspiration.

B. W.

Cambridge, January, 1911.

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BOOK II. OBLIGATIONS OF PUBLIC DUTY

PART III. DUTY TO THE PUBLIC

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# PUBLIC SERVICE CORPORATIONS

## CHAPTER I

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## § 1. Public callings and private business.

The difference between public callings and private business is a distinction in the law governing business relations which has always had and will always have most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business may always refuse to sell if they please. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports the mediæval system of established monopolies called for the legal requirement of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade

which gradually did away with the necessity for coercive law. Indeed in the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of the public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good; and it has been reluctantly admitted that State control is again necessary over such lines of industry as are affected with a public interest. Thus with varying importance the distinction between the public callings and the private callings has been present in our law from the earliest times to the present day. The common law requiring public service from those who profess a public calling has been ready to deal with every public employment at the instant of its recognition as such, for the protection of the whole people so far as it was generally felt that such protection was necessary.

*Topic A. The Mediæval Policy of Regulation*

**§ 2. The mediæval theory of State control.**

The mediæval system involved almost universal regulation of all the doings of men, and therefore its commercial policy was almost completely restrictive. The ideal held was a society in which all things were ordered, the full conception being that every man had a right to his place in this established order. This state of affairs was by most men greatly desired. Indeed, a regulated monopoly with the corresponding obligation of public service seemed in that age to the great majority of people far better than an unregulated competition without public obligation. It was thought that things were put in a true balance by requiring each person to perform his part and allowing no person to interfere with the employment

of another. And all of this control of industrial affairs was felt to be ultimately for the benefit of the whole public who could obtain thereby without favor at reasonable prices proper service in accordance with their requirements. In this industrial regulation it has been well said that the mediæval system was a consumer's policy far more than it was a producer's policy.

**§ 3. The regulation of business in the middle ages.**

In mediæval England this thorough system of State control reached a high state of development. Most of the trades in the towns were parceled out to the gilds. Under this system the services to be rendered to the public in the trades were governed by gild codes. These by-laws were continually declared void by the local courts if they were really inconsistent with public service. In the country at the same time there were to be met similar privileges in carrying on business in connection with the manorial system. Some business required the investment of more or less capital in constructing a plant, as the bakehouse and the mill. It may have been necessary at the outset that these should be provided by the lord of the manor; at all events in later times the seignorial ban covered these, the lord granting franchises to certain persons. Here again those who conducted these businesses were bound to serve all fairly or answer for it to the courts of the manor. But, upon the whole, the ordinary trades and crafts were more freely open to anyone in the country than in the towns, with their craft gilds and merchant gilds. This may explain why the cases requiring public service of carriers and innkeepers, ferrymen and farriers, appear so early in the royal courts; for there were no local courts with clear jurisdiction over the lines of travel across the country.

**§ 4. Early differentiation of the public service law.**

Thus there is to be found from the earliest times a peculiar law governing the conduct of those engaged in a public employment. The characteristic thing then as now was the legal imposition of an affirmative duty of proper actions upon those who openly professed a public employment, while those who carried on private business were under practically no duties which were not purely negative in character. This general distinction between the legal obligations of those in public calling and in private business was often of the utmost importance in our early common law. Indeed, whether the defendant was in common employment or not, made more difference in the success of a plaintiff's action or its failure than it does to-day. In those days contract law was so undeveloped that in an ordinary business one could not be held to his bargains, yet at that time in a public calling one was held to the public undertaking he made to serve all that might apply. So, too, while the law of tort as yet gave no remedy against one for negligent injury to property voluntarily intrusted to him in the course of ordinary business, in public employment one was answerable for failing to use proper skill in the calling he had assumed. However obsolete this substantive law may be as to private business, the subsequent developments in the law in no manner affect the force of these decisions in establishing the fundamental difference in legal situation between those engaged in public employment and those in private business.

**§ 5. Examination of the early public employments.**

The modern law governing public employments may therefore be said to be a survival of a more generally applicable principle of the mediæval law. It will be instructive with this in view to examine some of the early

applications of the mediæval law which depend upon the recognition of the common calling as presenting different conditions, and make plain, therefore, the necessity for this further law. It will be seen then that the law which suffices for ordinary business is never enough for these extraordinary callings. Moreover, in these earliest examples there are certain elements in the situation which are so characteristic that the realization of them should lead to some conception of the inherent character of the public employment and the special law necessary for its regulation. These principles of our common law are for all time. It would be too much to expect to see the law finally settled in those times, to find modern aspects of the problem altogether anticipated. But one may discover in these early cases the essential factors in the establishment of public calling, and the first principles involved in the law governing public employment.

**§ 6. The surgeon.**

The case dealing with the common surgeon most often cited is an anonymous suit in 1441.[1] This was a writ of trespass on the case against one R., a veterinary surgeon, to the effect that the defendant had undertaken to cure the plaintiff's horse with skill and care of a certain trouble, and that he then so negligently and carelessly gave his medicines that the horse died. But Judge Paston said: "You have not shown that he is a common surgeon to cure such horses, and therefore although he has killed your horse by his medicines, you shall have no action against him without an assumpsit." The court accordingly decided that a traverse of the assumpsit made a

[1] Y. B. 19 Hen. VI, 49, pl. 5. See also Y. B. 43 Ed. III, 6, pl. 11; Y. B. 3 Hen. VI, 36, pl. 33; Y. B. 11 Ed. IV, 6, pl. 10; 1 Roll. Abr. 10, pl. 5.

good issue. The significance of an actual assumpsit in those days, as has just been pointed out, was that when one man had authorized another to deal with personal property in the course of private business, the latter was under no legal liability to use care, unless he had made an express undertaking to that effect and entered upon the performance of it. In public business, on the other hand, the legal obligation to perform the act with proper skill in accordance with the public profession was well established. From other cases it is plain that the curing of man or beast was considered a public calling. In the rude England of these unlettered times such professional men were comparatively few. Frequently only one surgeon would be at hand in any one district, so that if he should refuse his services, all might be lost. Such being the situation it is easy to understand why the law was so stern in the case of the common doctor, requiring him to cure all who came by reason of his general profession and giving the patient an action, although he had submitted himself to the operation, if the doctor was negligent, although no care had been promised in the particular case. It was the unusual situation which produced this extraordinary law. To-day, however, there are so many physicians in most communities that the law apparently no longer deems it necessary to compel them to accept any patient who may call upon them.[1]

**§ 7. The tailor.**

Some light upon the position of the mediæval tailor before the law we obtain from an opinion of the great Brian: "I know well, if I put a robe with a tailor to be made, (or if I come to a common inn or a common smith with my horse) in all cases of the sort I may have my robe lying in

[1] Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135, 83 Am. St. Rep. 198 (1901).

the tailor's shop as long as I please (without its being subject to distraint); for he is compelled by the law to do it, and he may by the law detain until he be satisfied for the making." [1] It is rather difficult at present to imagine a state of society where there was not competition enough among tailors. Still, the time was when this most necessary calling was followed by so few comparatively, that for the protection of the public coercive law was deemed necessary. But in this calling there has been lively competition for so long that the tailor at a very early time dropped from the list of public callings, and is mentioned in the books no more as a member of this exceptional class of public servants.

**§ 8. The smith.**

Another instance is shown in an anonymous memorandum of 1450.[2] "Note that it was agreed by all the court that where a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case, notwithstanding no act is done; for it does not depend upon agreement. But where a builder makes a bargain to build me a house and does nothing, no action on the case, because that does sound in agreement." The meaning of this is that in those days no action lay upon a mere bargain and even the promisor in a contract need not perform; but one who undertook a public employment must perform, whether he agreed or not. Here again the obligation resting upon those in common callings to serve all that apply is the basis of the case. Why is this entire distinction made between the wayside smith and the journeyman carpenter? Because again the economic conditions of these trades were so different.

[1] Y. B. 22 Ed. IV, 49, pl. 15.

[2] Anon, Keilway, 50, pl. 4. See also Y. B. 46 Ed. III, 19, pl. 19; Y. B. 2 Ed. IV, 13, pl. 9; Y. B. 22 Ed. IV, 9, pl. 15; Y. B. 21 Hen. VI, 55, pl. 12.

So far apart were they in the eyes of the courts, that the ordinary law was protection enough for those that dealt with the carpenter, while an extraordinary law was needed in behalf of those that came to the smith. There is time enough in getting at builders to make the situtation in that business one of virtual competition, so that there would be no hardship in leaving builders free to bargain; but the farriers were so scattered that those who required their service immediately, were at the mercy of the particular one at hand. A special code, therefore, was necessary else a good horse might be ruined for want of a shoe, if the wayside smith should take it into his head to refuse service. Under modern conditions of trade, however, the public need is not so imperative as to keep the blacksmith in the class of public servants.[1]

**§ 9. The victualer.**

There was a time also when common victualers were strictly regulated by common law. The regular purveying of food and drink to the local public was felt to be of as much importance as the proper entertainment of the traveling public at the established inns. In a leading case in 1460 [2] Judge Moill treated these two callings as analogous. "If I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him; and in the same way if I come to a victualer to buy victual and he will not sell, I shall have an action of trespass on my case against him." Without such regulation it was felt that there might be oppressive treatment as the need of the purchaser was usually immediate and his market limited in many ways by the economic conditions of early trade. And to the strictness

[1] Bessette v. People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558 (1905).

[2] Y. B. 39 Hen. VI, 18, pl. 24. See also Y. B. 10 Hen. VII, 8, pl. 14.

with which the sale of such necessities of life as bread and beer were regulated innumerable assizes bear witness. A certain police power is still exercised to-day over these matters, but beyond this even those selling the most necessary food may refuse to sell to any person; a baker may refuse to sell bread to a starving man who tenders payment, so far as the modern law goes.[1] This is only to be explained on the ground that there is now usually sufficient competition among dealers, so that a case of the refusal of a cash buyer can hardly be imagined. Even so a man turned away can usually find another shop near by.

**§ 10. The baker.**

In the manorial economy the baker had his established place and was obliged therefore to supply his patrons upon reasonable terms, his rights being recognized and his obligations being enforced in the seignioral courts. Even after the business of baking became enfranchised by the breaking up of the mediæval system, the bakers at hand in any community had still such control of their local patronage as to make their continued regulation seem still necessary. Thus we have the assize of bread a regular part of the royal eyres [2] indeed the assize of bread was defended as late as the nineteenth century in an Alabama case.[3]

**§ 11. The miller.**

The early history of the gristmill is of the same tenor. Milling was originally a franchise in the manor and sub-

[1] See Brewster v. Miller, 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505 (1897).

[2] See for a typical instance, *Lib. Assis.* 138, pl. 44.

[3] Mayor v. Yuille, 3 Ala. 137 (1841), in which it is said: "Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turnpike roads, and other kindred subjects."

ject therefore to seignioral regulation.[1] As the miller had the exclusive franchise, he was considered bound to be ready to grind corn for all comers at reasonable rates and without discrimination. After these conditions changed the established mill still retained its virtual monopoly over its local district and the miller was bound now by the common law to grind for all in rotation. Indeed it remains law to this day, that the public miller is in common calling bound to serve all without discrimination.[2]

**§ 12. The innkeeper.**

Innkeeping has been regarded as a public employment from time immemorial. In all the cases from the time of our earliest reports the right of the traveler to entertainment at the common inn is affirmed. Hingham has many cases to support him when he says arguing in an early case,[3] "If I come to an innkeeper and pray to be lodged with him, and he says that at that time he will not, but if I come at another time he will with pleasure, I shall have an action on my case because it was his duty to lodge me, and by law he was bound to do it." The surrounding circumstances must again explain the origin of this unusual law. The whole system of travel and communication in rural England at the time the law of inns was in the making required that the weary traveler should find at convenient places beside the highway houses of entertainment and shelter to which he might resort during his journey for food, rest and protection. The ordinary laws of supply and demand might indeed lead to the establishment of such houses by the roadside at places which would sufficiently serve the public convenience; but those

[1] See Hix v. Gardner, 2 Bulstrode (Eng.), 195.

[2] See cases cited § 71, *infra*.

[3] Y. B. 14 Hen. VII, 22, pl. 4. See also Y. B. 11 Hen. IV, 45, p. 8; Y. B. 22 Hen. VI, 21, pl. 38; Y. B. 22 Ed. IV, 49, pl. 15; Y. B. 10 Hen. VII, 8, pl. 14; Keilway, 50, pl. 4; Rex v. Collins, Palmer, 373; Anonymous, Godbolt, 345.

laws could not be trusted to secure to each individual the benefit of the food and shelter therein provided. In a matter of such importance the public had an interest and the law must see that, so far as was consistent with justice to the innkeeper, his inn was carried on for the benefit of the whole public. The inn has always been in a true sense a public house.[1]

**§ 13. The carrier.**

From the earliest times also, it has been agreed that the common carrier of goods is in a public employment. A statement of the early law is to be found in one of the leading cases on carriers, Jackson v. Rogers,[2] "This was an action on the case for that whereas defendant is a common carrier from London to Lymmington *et abinde retrorsum*, setting forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire. And held by JEFFRIES, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same. *Note*, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict." Again the explanation must be sought in the history of the times. In Plantagenet England the population lived apart in separate communities. Small attention was paid to the roads connecting them which were no more than trails winding through the wilderness. No cart could pass over them, only pack animals with the goods in their panniers. So many were the bands of outlaws in the

[1] See the modern cases in § 121, *infra*.

[2] 2 Show. 327 (1683). The whole report of this case is included in the quotation which follows. See also Rich v. Kneeland, Hob. 17; Kenrig v. Eggleston, Al. 93; Nicholls v. More, 1 Sid. 36; Morse v. Slue, 1 Vent. 190.

greenwood that no man might with safety traverse these paths alone. The transportation of goods was, therefore, given over to the carrier, who traveled oftentimes with trains of pack animals, and a considerable company. Few would pass over the same roads between the same towns, because the traffic was still comparatively small, as England had as yet but little beyond a local economy where each community was sufficient to itself, into a national economy which involved interchanges of goods between distant markets. The conditions surrounding transportation, therefore, were those of virtual monopoly. The merchant must appeal to the protection of the law, a protection without which he was at the mercy of the carrier with whom circumstances forced him to deal without a chance for choice.[1]

**§ 14. The ferryman.**

Ferrymen are found in public employment in our early reports. Their necessity in maintaining through routes of travel was most obvious in England with its coast so indented with estuaries and its many rivers sufficiently large to make bridging in those times a financial, if not an engineering impossibility. Apparently the most of the early cases in regard to them had to do with the exclusive franchise which they almost invariably possessed, although there are a few in relation to their duties. In one of these[2] it was said that a ferryman who invited business was liable in tort if he overloaded his boat whereby a passenger's horse was drowned.[3]

**§ 15. The wharfinger.**

In a commercial port those who own the convenient sites for wharfage upon deep water possess a peculiar

[1] See the modern cases, §§ 189, 234, *passim.*

[2] Y. B. 22, *Lib. Ass.* 94, pl. 41.

advantage. It was of such wharfinger that Lord Hale in his *De Portibus Maris* [1] wrote the most famous paragraph in the whole law relating to public service. It is there that he says that whenever the king or a subject have a public wharf to which all persons must come who come to that port to unload their goods—"in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, etc., but the duties must be reasonable and moderate, for now the wharf and crane and other conveniences are affected with a public interest and they cease to be *juris private* only." [2] No more significant phrases were ever penned.

*Topic B. Persistence of this Police Power*

**§ 16. Continuance of State regulation.**

The irresistible advances of the modern competitive system gradually worked the destruction of the mediæval organization of industry. Great, however, as was this change from the old economic theory to the new, it was gradual, and it was never complete. There was a swing of the pendulum. General but not absolute restriction of freedom of trade was the policy of the middle ages; general freedom of trade, with the restriction of certain exceptional occupations, has become the policy of modern times. A state of free competition has been for several centuries now considered to be for the best interests of society; and, therefore, in modern times almost every business has been opened to almost every man. And yet at all times in economic history, both restriction and freedom are to be found in the law. The proportion, however, changes greatly. In one epoch there is much legal limitation, with little freedom left; in another age there is almost universal competition, with

[1] Hargrave Law Tracts, 78.

[2] See § 116, *infra*.

some little franchise to be found. And the rule will generally hold true that the more the natural laws of competition regulate service and price, the less the State need interfere in these respects; but conversely when competition ceases to act efficiently State control becomes necessary.

**§ 17. Parliamentary regulation of rates.**

During this transitional period when the mediæval system of customary laws ceased to operate effectively Parliament itself frequently regulated the prices of necessaries of life by direct legislation. The great staples, like wool and food, were habitually regulated in this way, and the employment and the price of labor was a subject of statutory provision. Thus, in 1266, Henry III, after reciting former statutes to the same effect, regulated the price of bread and ale according to the price of wheat and barley, and forbade forestalling; that is, cornering the market.[1] In 1337 it was made felony to export wool, and the importation of cloth was forbidden.[2] In 1349 all laborers were obliged to serve for the customary wages, and "butchers, fishmongers, regrators, hostelors (i. e., innkeepers), brewers, bakers, poulterers, and all other sellers of all manner of victuals," were bound to sell for a reasonable price.[3] These statutes continued in force throughout the middle ages, and until after the settlement of America.

**§ 18. Restriction of prices in the colonies.**

This legislative power the colonists brought to America with them. In a new colony life is a serious thing, the necessaries of life are scarce, and the needs of the public are pressing. The conditions are ideal for a distressing

[1] 51 Hen. 3 Stat. 1.
[2] 11 Ed. 3, cap. 1.
[3] 23 Ed. 3, cap. 1.

cornering of the market by merchants. Accordingly, though most of the statutory regulations of trades and prices had either been repealed or had become obsolete in the mother country, the colonies at an early time passed statutes regulating the prices of staple commodities. Thus in Massachusetts in 1635 shopkeepers and merchants were forbidden to charge excessive prices.[1] In Plymouth colony the price of boards was fixed in 1668.[2] Corn and tobacco, beer and bread, beef and boards, all that was most important for the colonists to have was regulated as a matter of course by the assemblies of the time.

**§ 19. Persistence of the legislative power.**

This extreme form of the police power over public employment remained in the legislative branch notwithstanding the general guaranties of individual liberty contained in the American constitutions. To compel the proprietors of those businesses which had been regarded as peculiarly affected with a public interest to serve all that applied at reasonable rates was immemorial practice and therefore was indisputably due process of law. This historical argument was given chief place by the Supreme Court of the United States in the leading case [3] on this branch of the police power. "Under these powers," said the court, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers,

[1] Mass. Colon. Laws, 1672, p. 120.

[2] Plymouth Colon. Laws, p. 46.

[3] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876).

wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

**§ 20. Survival of the common law.**

From one point of view the constitutional validity of legislative control is conclusive evidence of the persistence of the common-law principles regulating public employments. The common law persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The early cases which were just under discussion are illustrations of this course of events. Barber, surgeon, smith and tailor are no longer in common calling because the situation in the modern times does not require it; but innkeeper, carrier, ferryman and wharfinger are still in that classification, since even in modern business the conditions require them to be so treated. With changed economic conditions in modern times new callings have come into being with such potentialities that this special law has been utilized as never before in regulating them. Indeed, from the point of view of one who believes in our common law the class of public callings is capable of indefinite extension whenever new conditions bring new employments within its scope.[1] And in all times our law has held to the principle that this peculiar regulation was necessary

[1] The historical argument is effectively used in many cases, but in no one is it more elaborately put than in People v. Budd, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 549, 15 Am. St. Rep. 460 (1889).

in certain kinds of business. It depends largely upon the opinion current at the time how far this law shall be extended. But however much public opinion may change this possibility of the enforcement of the obligation to the public owed by those who conduct a business public in character remains.

**§ 21. Callings connected with transportation.**

Certainly as to those callings intimately connected with common carriage this regulation by the common law has always been felt necessary. The traveler who is far from home must depend upon strangers; and the shipper who must send his goods through strange lands takes unknown risks. As has been seen the situation is such that the carrier of passengers or goods by land or sea has always been obliged by law to serve all, and is by the common law under extraordinary liabilities. And also the situation continuing the same as before, the innkeeper remained under obligation to serve all and under other extraordinary liabilities. The ferryman too remained in public employment as a sort of carrier. And the wharfinger receiving goods in transit was held to be not unlike the innkeeper receiving travelers. All the other mediæval public employments had disappeared and these alone survived. In the first part of the nineteenth century, therefore, the generalization was being made (and not without a certain justification from the facts) that all of the public employments were connected in one way or another with transportation. Indeed this generalization became so accepted that when later in the century new conditions pressed for further application of the law requiring the service to the public, the attempt was made in the first common-law decisions dealing with these businesses to include other services quite different in character within this generalization. Thus telegraph

companies [1] and even telephone companies [2] were said to be common carriers, and sleeping cars [3] and steamboats [4] were by some thought to be inns. But those judges who looked at these new callings in this light saw through a glass darkly. It was given to others to see the vision of a great class of public callings of which those connected with transportation constituted but one branch, although the principal one.

**§ 22. Introduction of improved highways.**

What was destined to give the greatest scope to the public service law was the improved facilities for transportation. It was late in the eighteenth century that the need for transportation of persons and goods more quickly and more cheaply between distant communities began to outgrow the facilities for commerce then at the disposal of the public. The solution of this question thenceforth became one of the most pressing economic problems of the time, engaging the attention of statesmen, as every great commercial problem must. The scheme gradually worked out was a system of improved turnpikes all over the country supplemented by toll bridges, and between the most important markets the construction of canals and the development of existing water ways. The theory of the statesmen of the early nineteenth century who dealt with the conditions under which these works of internal improvement should be constructed was that private enterprises were better than State ownership. However, they were willing to meet the need of the time for immediate construction

[1] See this phrase in Western Union Telegraph Co. v. Hamilton, 36 Tex. Civ. App. 300 (1904).

[2] See for one example McDaniel v. Faubush Telephone Co., 32 Ky. L. Rep. 572, 106 S. W. 825 (1908).

[3] See especially Pullman P. C. Co. v. Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809 (1889).

[4] See, however, Clark v. Burns, 118 Mass. 275 (1875), 19 Am. Rep. 456.

of these expensive works by grants from the State treasury or by guaranty of the bonds of the private companies. These improved highways were considered like other highways, public in character and open to all, though maintained by private companies which were given the franchise to charge tolls without which none could be demanded.

**§ 23. Toll bridges.**

On important lines of travel even over considerable spans, bridges began to replace the ferries. As the ferries had been maintained by private parties with an exclusive franchise, charging ferriage, the bridges were built by private companies with an exclusive franchise [1] such as the ferryman had, charging tolls as the ferryman did. For the charging of tolls it is to be remarked a rough classification was made, and on that point there is some public service law from this period. One interesting scheme was the chartering of bridge companies with the provision that when the cost of the bridge, together with a certain per cent of profit should have been repaid to the proprietors, the bridge should become free.[2]

**§ 24. Turnpikes.**

Throughout the country, turnpikes were constructed of various kinds, gravel roads and plank roads, for example. These were built by private companies with a protecting franchise, charging tolls roughly classified. Some little public service law dates from this period; for such improved highways were regarded as public in character by whomsoever owned.[3] As one court [4] put this

[1] See the Binghamton Bridge, 3 Wall. 51, 18 L. ed. 137 (1865).

And see generally § 53, *infra*.

[2] See Commonwealth v. Hancock Free Bridge Corporation, 2 Gray, 58 (1854).

[3] See citations in Covington & L. Turnpike Road v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198 (1896). And see generally § 84, *infra*.

[4] The quotation is from Olcott v. Supervisors, 16 Wall. 678, 21 L. ed. 382 (1872).

principle in those earlier days: "Though the ownership is private, the use is public. So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris*."

**§ 25. Canals.**

In England the canal period was of considerable duration. Construction was begun soon after the middle of the eighteenth century and did not noticeably cease until about the middle of the nineteenth century. From the first the canals carried a very large traffic upon which they imposed regular tolls upon a classified basis. In the United States also many canals were constructed, largely aided by the State governments. At one time it seemed to the most enthusiastic believers in the canal system that it was the ultimate solution of the transportation problem. It was recognized in all cases that all boatmen had the right to pass through these canals upon paying to their proprietors the established tolls.[1] Much public service law dates from this time. The cases upon the proper priorities to be observed in the management of a public business are particularly interesting.[2]

**§ 26. Railways.**

The early railways as is generally known were first introduced as improved turnpikes, draft animals being used to haul the wagons upon the rails. The invention of the steam locomotive with its great cost and high speed soon put an end to that system.[3] But for a short period it was still supposed that both animals and locomotives might be used upon the same rails; the railroad might both carry goods and maintain a tramway for its patrons. However, it was soon seen that the whole

[1] See § 142, *infra*.

[2] See, for example, Farnsworth v. Groot, 6 Cow. (N. Y.) 698 (1827).

[3] See Raleigh & Gaston R. R. v. Davis, 2 D. & B. 451 (1837).

operation must be by the railway company; and the railroad entirely ceased to be a turnpike and became a carrier altogether.[1]

### *Topic C. The Period of Laissez Faire*

**§ 27. Alteration in economic conditions.**

In the early part of the nineteenth century a combination of economic factors brought about in the business world as near an approach to a condition of freedom in competition as can ever happen in a world limited by time and space. Naturally enough with such individual freedom of action *laissez faire* became the accepted policy for dealing with the business world as the occasions for the application of the principles of law regulating public callings become fewer. This condition of affairs prevailed to a remarkable extent in the United States during the first half of the nineteenth century. The English system of excessive legislative regulation by Parliament having become distasteful, the constitutions of the original States and of the United States carefully limited the power of legislatures to interfere with the ordinary affairs of business. Regulation of private affairs by the law may be said to have been at a minimum in the first half of the nineteenth century. And in this time of small enterprises it was safe to leave the individual proprietor free to deal with his customers as he pleased.

**§ 28. Development in the common law.**

It is almost a truism that the spirit of the age molds its law. Those who frame the laws are members of the community and share its spirit. The age's ideal of right is their ideal, the method of thought about justice which is prevalent at the time is their method of thought, too; and it therefore follows that in working out legal prob-

[1] See § 144, *infra*.

lems, both bench and bar work along the lines prescribed by the spirit of the age in which they live. Nowhere is the influence of the spirit of the time on the common law more evident and more potent than in this question of the regulation of common callings. Following the change in economic thought which has been described, the judges of the last century began to say as to his business activities that it lay with the tradesman to conduct his business as he pleased, at his own prices. This was a period when all men were much attracted by the theory of *laissez faire*—that the most desirable thing was the least possible interference with business relations by the State. That the coercive law of public calling survived this period is proof positive of its absolute necessity to a greater or lesser extent in every society.

**§ 29. Freedom of business from state control.**

It will have been noticed, therefore, that the principle of law which permits the regulation of these callings has never been abandoned, though the conditions calling for its application at various times have greatly changed. Whenever the public is subjected to a monopoly the power of oppression inherent in a monopoly is restricted by law. Whenever, on the other hand, competition becomes free, both in law and in fact, the need of governmental regulation ceases; public opinion ceases to demand such regulation, and the law withdraws it. At the beginning of the nineteenth century was the extreme swing of the pendulum. In earlier times, when most trades were privileged, it was felt that there was a correspondingly great need of regulation. In this fortunate time when in most businesses the field seemed free to all, the belief was that the ordinary processes of competition would produce with sufficient certainty adequate service at fair prices. But an absolutely free competition is practically an im-

possible economic condition; and to this men later awoke when with the growth in the power of the proprietors of the industries the people still demanded protection from the State in many ways.

**§ 30. Special restrictions in early charters.**

One method of regulation of enterprises public in character during this period has not been mentioned as yet. These were great undertakings which were projected—bridges and turnpikes, canals and railways. To carry them out required aggregated capital; to maintain them required permanent organization. There was a form of organization as yet confined to purposes in some degree governmental, which was best designed to bring together the necessary capital and give the necessary permanence—the corporation. And although it was not as yet considered proper to give this franchise of being a corporation to men engaged in purely private business, it was thought most appropriate for the State to create a corporation for such purposes. Moreover in granting the franchises the State could impose upon the grantee such terms as it might think necessary for the protection of the public in its dealings with the corporation. And so the charters of this period are often elaborate in their provisions, imposing upon the corporation the duty to serve all that apply properly and without exceeding a certain fixed profit. Later in the century, however, incorporation under general law for the conduct of private business became possible; and in the case of such corporations there were no provisions for public service. There followed a short period about the middle of the century when it was felt by some that unless in the incorporation of an enterprise its public character was sufficiently declared by express clauses in its charter, the proprietors were free to carry on their own business in their own way.

**§ 31. Gas supply.**

When, therefore, the first gas works were constructed under general charters of incorporation imposing no specific duties upon them, the courts declined to interfere with them in their dealings with their public, although the continuous complaints of the consumers should have made obvious the necessity for relief from the oppression of the established monopoly. Thus in Paterson Gas Light Company v. Brady,[1] where the plaintiff complained that although his buildings were located upon the lines of the main pipes of the defendant company, it refused to furnish him with gas, although he was willing to pay the fixed price, the upper court held that the action should have been dismissed, Mr. Justice Elmer saying: "The language of the charter is throughout permissive, and not compulsory. The company may organize, may make and sell gas, or not, at their pleasure; and I see no more reason to hold that the duty of doing so is meant to be imperative, than to hold that other companies incorporated to carry on manufactures, or to do any other business, are bound to serve the public any further than they find it to be their interest to do so. It was earnestly insisted, on the argument, that the community have a great interest in the use of gas, and that companies set up to furnish it ought to be treated like innkeepers and common carriers, and that, if no precedent can be found for such a decision, this court ought to make one. But that there is no authority for so holding in England or America, where companies have been so long incorporated for supplying water and gas to the inhabitants of numerous towns and cities, affords a strong presumption that there is no principle of law upon which it can be supported." [2]

[1] 3 Dutch. (N. J.) 245, 72 Am. Dec. 360 (1853).

[2] Other early cases to the same effect were:

**§ 32. Water supply.**

The difficulty was, as the reader will recognize, that these questions arose just at a time when the doctrines of *laissez faire* had almost destroyed the class of public employments, and almost obliterated the general principles of the common law relative to public service. But the new situation called forth the old law and eventually restored it. In a case [1] regarding the constitutionality of the grant of eminent domain to a waterworks company, decided about the middle of the nineteenth century by Chief Justice Shaw, he worked out a duty to supply the public by reason of the enabling clauses in the charter of the company in a way which would be plainly unjustifiable unless there were an underlying public duty. "The supply of a large number of inhabitants with pure water is a public purpose," he said: "But it is urged, as an objection to the constitutionality of the act, that there is no express provision therein requiring the corporation to supply all families and persons who should apply for water on reasonable terms; that they may act capriciously and oppressively; and that by furnishing some houses and lots and refusing supply to

*Connecticut.*—McCune v. Norwich Gas Co., 30 Conn. 521, 79 Am. Dec. 278 (1862).

*Massachusetts.*—Com. v. Lowell Gas Light Co., 12 Allen, 75 (1866).

*New York.*—New York Central & H. R. R. Co. v. Metropolitan Gas Light Co., 63 N. Y. 326 (1875).

*Ohio.*—See Zanesville v. Gas Light Co., 47 Oh. St. 1, 23 N. E. 55 (1889).

*Pennsylvania.*—Com. v. Wilkes-Barre Gas Co., 2 Kulp, 499 (1883).

*England.*—Hoddesdon Gas & Coke Co. v. Haselwood, 6 Com. B. (N. S.) 239 (1859).

The honor of being the first to appreciate that the gas business was public in character belongs to the court which decided Shepard v. Milwaukee Gas Light Co., 15 Wis. 318, 82 Am. Dec. 679 (1862). The modern decisions establishing that the gas companies are in public calling are discussed in § 131, *infra*.

[1] Lumbard v. Stearns, 4 Cush. 60 (1849). The modern cases establishing that the water companies are in public calling are discussed in § 102, *infra*.

others, they may thus give a value to some lots, and deny it to others. This would be a plain abuse of their franchise. By accepting the act of incorporation, they undertake to do all the public duties required by it. When an individual or a corporation is guilty of a breach of public duty by misfeasance or non-feasance, and the law has provided no other specific punishment for its breach, an indictment will lie. Perhaps, also, in a suitable case, a process to revoke and annul the franchise might be maintained." [1]

**§ 33. The struggle against encroaching monopoly.**

As the prevalence of competitive conditions in business limits the application of the principles of public service law, so the prevalence of monopolistic conditions extends their application. Such a change came about in the latter part of the nineteenth century. About a generation ago a change in commercial practice showed with remarkable distinctness the advantage of combination. Great enterprises took the place of small ones, and great enterprises required co-operation and combination. As the people became accustomed to look upon combination as the price of success, they came more and more to regard it as a blessing rather than an evil; and public opinion has gradually turned away from the individualistic ideal until to-day it has been fairly discarded by the current philosophy. With the principle of combination as the spring of action has come a corresponding need of controlling the action of such combinations for the good of the whole public. As the rights of the individual trader yield to the rights of the great corporation, so in the view of the man of the present day, the rights of the corporation, should in their turn yield to the rights of the whole people. The same spirit which fosters combi-

[1] See Olmsted v. Morris Aqueduct Co., 47 N. J. L. 311 (1885).

nation, fosters also control of the combination for the public benefit. The spirit of the present age, therefore, has come to be a spirit which demands that great business enterprises should be conducted in accordance with the requirements of society. The programme of organized society is practically to see to it that those who have gained a substantial control of their market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action in the industrial world may work injuriously for the public, and it must then be restrained in the public interest. Having seen the results of unrestrained power we no longer wish those who have control of our destinies to be left free to do with us as they please. Such liberty for them would mean enslavement for us.

**§ 34. Conservative and radical views of regulation.**

While it is generally agreed that a change has come over the spirit of our time, that State regulation is the prevailing philosophy of the people at the beginning of the twentieth century; it must be borne in mind that this has been the result of a gradual progress of thought, and that this progress has not affected all men or all lawyers equally. Now, as at all times, there are conservative lawyers and radical lawyers, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been laggards, and in every such change there have been those who are unable justly to estimate the true meaning of the change, and work beyond it into eccentricities in which the people will never follow them. We have, therefore, three general types of thought at every time: the conservatives, the moderates and the radicals. And this is as true of legal as of economic thought. Many lawyers still hold conservative views as to the application of the

law of public callings to modern conditions. They believe that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes. And some economists still tell us that the only way to get efficient service for the public is to allow the public service companies the right of exacting such rewards as they are able to get. But in spite of these now obsolescent views there can be no question that the tendency to-day is to restrain in the interests of society all business which has obtained undue power. Individual freedom is limited by the modern notion of social justice.

*Topic D. Present Control of Public Employment*

**§ 35. Economic conditions at the present time.**

As a result of these changed business ideas, and of the great inventions which have constantly tended to increase the magnitude of business enterprises there has been as has been seen in the last fifty years a great growth of employments which have gained virtual monopoly in matters of public necessity. The positive law of the public calling is the only protection that the public have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our law been permeated with the theory of *laissez faire*, which was but lately so prominent in the policy of our State, that the admission has been made with much hesitation that State control is ever necessary. But the modern conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail; for in conditions of virtual monopoly, without stern restrictions, there is always great mischief. There is now fortunately almost general assent to State control of the public service companies, since it is recognized that the special situation requires a special law.

**§ 36. Control of the public services necessary.**

The hypothesis here put forward is that whether a business is public or not depends upon the situation of the public with respect to it. Are there enough of such purveyors to serve the public? or are there, for permanent reasons, never enough? If so, there will be virtual competition; if not, there will be virtual monopoly. In all of the businesses to be discussed in these chapters, competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners. They are affected with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Plainly we have in the accepted use of these phrases the manifestation of a deep-seated change in habits of thought. Only twenty-five years ago the general feeling as to every sort of industrial relation was that it was better to leave all alone, that it was better to leave people to work out their own salvation. But of late years we have been calling upon the State to save us from monopoly in all its forms; and we are impatient if it delays.

**§ 37. Variety of the public services.**

The present situation is plain enough to all of us. Whatever way we turn we depend upon a service that is public in character. Not only in long travels but in short journeys we employ common carriers—railroads and steam-

ships, coaches and cabs, street cars and omnibuses, the subway car and the elevated train. If we ship goods there are various transportation services at our disposal beside railroads and ships, such as express companies and dispatch lines, refrigerator lines and tank lines. If we are journeying ourselves we eat at hotel restaurants, and put up at public inns, or travel in palace cars and lodge ourselves in sleeping cars. Our freight in its transit has its needs attended to—for our goods, warehouses, for our grain, elevators, for our cattle, stockyards, and for our exports, docks. In almost every community, even relatively small, we have for our household needs gas, electricity, water supply and sewerage service provided for us, usually, except the last two, by private companies in public service, but even where the service is provided by the municipality it is subject to the same law governing public service. For speedy communication in our business and pleasure, we have the telephone and telegraph in common use, and ticker service and messenger call for special needs. One may judge by this incomplete list how common to every part of our modern life are the various public services, and how necessary it is that they should be required by law to serve us all with adequate facilities for reasonable compensation and without discrimination.

**§ 38. Differentiation of the public service law.**

It is unnecessary at this day to point out the plain distinction of the law governing public services from that governing private employment. All businesses both public and private are subject, to be sure, to that general police power of the State whereby in any civilized society the effort is made to so order things that one may not use his own so as to injure another. But any comparison of the large amount of regulation which it is considered

proper for the State to enact in regard to public services with the small amount of regulation which it is considered proper for the State to enact in regard to private business is in itself significant enough. The difference thus shown is more than one of degree; it is one of kind. For it will be noted that it is in public business that the law imposes affirmative duties; while generally speaking the duties imposed upon those in private business are negative. The law says to those in public business you must do this for this applicant, and you must do it thus and so. To those in private business it says you must not do this, or if you do this you must do it thus and so. As has been pointed out before, this is the chief distinction between public calling and private calling; in one there is a coercive law intimate in its details, in the other there is a restraining law general in its rules.

**§ 39. Unity of the public service law.**

Not only has it been realized at last that we have relating to the public services a distinct department of the law, but also it is becoming recognized that within this department there is a consistent body of law in process of unification. Not merely does the law governing the supply of gas differ from the law as to the sale of candles, but the law governing the supply of gas is the same in all essentials as the law as to the supply of electricity. It is in the firm belief that the law governing the public services will prove upon analysis to be a really unified body that the author has been working for many years. General principles will be developed throughout this book and corollaries to them established by the use and with the co-ordination of cases from a variety of public employments. Certainly the general propositions hold true as to all public employments—that all must be served, adequate facilities must be provided, reason-

able rates must be charged, and no discriminations must be made. Moreover in dealing with the minor details of these principles, cases from one service will be found in point in another—what conditions there are precedent to service, what will excuse failure in provision of facilities, what is a proper basis for calculating rates and what differences constitute discrimination.

**§ 40. Present state of the public service law.**

In the belief of the writer the public service law has at length reached a stage of development in which it may be possible to state its principles with some degree of confidence. It is only within the last few years that it would have been within the range of possibility to do this. Twenty-five years ago the public services which were recognized were still few and the law as to them imperfectly realized. It was known from olden times that those who professed a public employment must serve all at a reasonable rate. As to the duty to serve it was thought that there were exceptions. As to the restriction of rates there was no standard. The important duty to provide adequate facilities had hardly advanced beyond the general law as to negligence. And the duty not to discriminate was denied altogether. Even ten years ago when these four obligations had become generally recognized, the details as to them in regard to any particular employment had been worked out only in very fragmentary manner. But at the present day it is just being appreciated that rapid progress may be made by the general recognition of the unity of the public service law, whereby cases as to one calling may be used to show the law in all. In this treatise this method is adopted for the first time. Indeed, it is only in our present day that the attempt to treat the public service law as a consistent body of law could be made with any hope of success.

**§ 41. Imperative need of effective regulation.**

It has been remarked many times that the common law may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. One of the most striking of modern instances of this capacity of growth in the common law is the astonishing progress in the working out of the detail of the exceptional law governing the conduct of public callings. As the public service law grows it is becoming both more intensive and more extensive. In recent times there undoubtedly is an increasing need of this stricter regulation of all employments which appear to be affected with a public interest. While it is true that there are many men who still avow the principle of *laissez faire*, who say that it is the better policy to leave all business with as little interference from the law as possible; the most of men at least appreciate that the law has already taken control of the situation for all time. It is hardly too much to say that the efficient regulation of the public employments by sufficient law is the most pressing problem confronting this nation; and it must be met without further hesitation. As these great combinations of capital have grown up under the law, so their legal rights must be subject to the rights of the whole people. Great power brings as its consequence the need of control of that power for the good of the whole people. Two ways only can be found to exercise such control. One way, that advocated by the radical persons, is government ownership and operation of the public utilities. The other way, which is in fact the conservative method of dealing with the problem, is the control of the rates and practices of the public service corporations for the public good. One or the other of these methods must be finally adopted. The conservative method is now on trial. It behooves

the lawyers to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership.

**§ 42. Ultimate limitations upon public employment.**

In this crisis of affairs the people must be assured that the law is indeed adequate to deal with the situation, that it has not only elaborated detail to meet obvious wrongs seldom defended, but also enlightened comprehension to deal with the large policies openly justified which are truly inconsistent with public duty. That those who profess a public employment owe the utmost public service, should be generally accepted as the fundamental principle upon which the law governing public employment is to be based. It is not agreed, however, how far this principle should be pressed; there is a clash of interests here, and there is an inclination on the part of those who conduct the public services to contest every issue. This is hardly an enlightened selfishness; for it seems to many who appreciate the temper of the public, that the time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of the present condition of individual enterprise. It would be well, therefore, if the restless and the doubting who see many abuses and many wrongs in the conduct of our public services without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. And it should be sufficiently emphasized at all times in all situations that public servants may not adopt to the prejudice of their publie various profitable policies, and

then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

# BOOK I. ESTABLISHMENT OF PUBLIC CALLING

# PART I. PUBLIC EMPLOYMENT

## CHAPTER II

### MONOPOLY DUE TO LEGAL PRIVILEGE

§ 50. Legal privileges accompanying public employment.

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**§ 50. Legal privileges accompanying public employment.** That legal privileges frequently accompany public employment is the first thing that has struck many observers as characteristic of the class. It is indeed common to find in the case of certain public employments an exclusive franchise; and such legal monopoly has been said to carry with it the consequent obligation of public service. To aid in the construction of its works, it will frequently be found that eminent domain has been given to the public service companies conducting the business; and here again it is often said that the acceptance of such a special privilege creates obligation to serve the public. From time to time, the statement is made that when aid is granted from the public treasury whether in the form of outright gift or by guaranty of the securities of the corporation conducting the services, the result is that the services of these companies are at the disposal of the public. Finally, many public service corporations are given in one way or another special privileges in the public highways; if these companies accept these favors from the public, it is said, they must serve the public. It is, of course, true, that in the case of the most of the public services some one of these privileges will ordinarily be found in any particular case. In many instances several of these different kinds of aid from the State will be found to have been given to a single company. That under such conditions if the grant is valid those who are enjoying such special privileges must be at the disposal of the public is plain; but it cannot be said that such a coincidence establishes a con-

sequence. One insuperable difficulty with this common explanation that public employment owes its origin to the grant of public privileges, is that there are a considerable number of public employments always recognized as such, which have no such public privileges whatsoever.[1] What is perhaps of even greater significance is that there are very many cases in which the grant of special rights, such as exclusive franchises, eminent domain, State aid, or highway franchise to a business concern of private character is held to be wholly void upon the ground that such special rights may only be given to such enterprises as are public in character.[2] It would seem, therefore, that the effect has sometimes been mistaken for cause here; that although many of these special privileges often accompany public employment, the truth is that these very privileges could not have been validly granted unless these businesses were public in character. It is submitted therefore, without going into more detail about the matter, that under our constitutional system no special privileges can be granted except for a public purpose. Unless there is public interest apparent the grant is void. The question thus arises whether the conditions of virtual monopoly, however caused, may not give rise to public calling if the State has had no hand in the establishment of the situation. These considerations are most suggestive; indeed, one is led by them to an entire inversion of the common statement of the relation between the existence of public privileges and the establishment of public employment. It is common to argue that because a certain business has had a certain privilege granted to it, the consequence of that limitation is that the business is put by the courts in the class of

[1] See People v. Budd, 117 N. Y. 1, 22 N. E. 670, 5 L. R. A. 559, 15 Am. St. Rep. 460 (1889).

[2] See Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472 (1905).

public callings. But the real truth of the matter seems to be in the opposite statement, that no business can be granted a privilege under our constitutional system unless it is public in character.

### *Topic A. Exclusive Franchise*

**§ 51. Exclusive franchise for public purposes.**

Modern ideas as to exclusive franchises first appeared in the opposition to the patents of monopoly which were disposed of all too freely by the Tudors and the Stuarts. Originally instituted as a method for the encouragement of new industries and large enterprises, as glass and steel, it was naturally felt to have become an abuse when patents of monopoly were granted for ordinary trades and commodities, as oil and leather. These private monopolies were decried in the great Case of Monopolies [1] in language as extreme as any which has ever been used since; "for the end of all of these monopolies is for the private gain of the patentees and although provisions and cautions are added to moderate them, yet *res profecto stulta est nequitiæ modus*, it is mere folly to think that there is any measure in mischief or wickedness." According to present ideas, therefore, exclusive franchises can only be granted for public purposes. "Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege, or power of public concern which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest and for the public security." [2] In this light our problem is made at

[1] 11 Coke, 84b.

[2] California v. Central Pacific Ry., 127 U. S. 1, 32 L. ed. 150 (1887).

once clearer and more difficult. When the validity of the grant of an exclusive franchise to a business enterprise is in question, the rule is that such franchises can be granted only to such businesses as are public in character. It is well established that exclusive franchises may be given for gas supply [1] and electric lighting,[2] to give two modern instances. On the other hand, when an exclusive right is claimed by virtue of some incautious grant for such private businesses as baiting animals [3] or selling merchandise [4] the grant is disposed of simply enough as invalid under our constitutional law. No one would think of saying that these businesses were made public by the grant of the franchise and therefore the legislation was made constitutional; such a course of reasoning would be too patently circular. To this general theory there are apparently two important exceptions at the present time—the patent and the copyright which are still freely granted for any purpose without any corresponding legal obligation. The policy still seems to be that new inventions and novel ideas should be fostered and protected at all costs. But, as will be seen later, in the case of the telephone it is already law that a patent so devoted to a public use is subject to the full regulation of the public service law notwithstanding that it is generally said that the owner

[1] *Illinois.*—People v. People's Gas Light Co., 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244 (1903).

*Louisiana.*—Davenport Gas &c. Co. v. Davenport, 124 Ia. 22, 98 N. W. 892 (1904); Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann. 138 (1875).

*Missouri.*—Vanderberg v. Kansas City &c. Gas Co., 126 Mo. App. 600 (1907).

*Wisconsin.*—State v. Milwaukee Gas Light Co., 29 Wis. 454, 9 Am. Rep. 598 (1872).

[2] *Iowa.*—Davenport Gas & Electric Co. v. Davenport, 124 Iowa, 22, 98 N. W. 892 (1904).

*Oklahoma.*—Territory v. DeWolfe, 13 Okla. 454, 74 Pac. 98 (1903).

[3] Com. v. Bacon, 13 Bush, 210, 26 Am. Rep. 189 (1877).

[4] Thousand Island Park Assn. v. Tucker, 173 N. Y. 203, 65 N. E. 975 (1903).

of a patent can deal with it as he pleases. So although the owner of a copyright is said to be free to get such returns from it as he pleases this statement cannot now be made with entire confidence. The publishers of market quotations for example cannot deal with the public at their caprice.

**§ 52. Ferries.**

The practice of granting exclusive franchises for the operation of ferries is found in our earliest reports, the cases being frequent where the franchise is recognized and protected from invasion.[1] The propriety of such grants has never been denied even in those times when there has been the most outcry against monopolies. For the necessity of such protection to those engaged in the service is recognized; and the evil of monopoly is curbed by the requirement of public service. As a result the exclusion of other ferrymen by an exclusive franchise has been always held under American constitutions to be due process of law.[2] In the North Dakota case the propriety of

[1] *Georgia.*—Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770 (1900).

*Massachusetts.*—Fay, Petitioner, 15 Pick. 243 (1834).

*North Carolina.*—Long v. Beard, 3 Murphy, 57 (1819).

*South Dakota.*—Evans v. Hughes County, 3 So. Dak. 580 (1893).

*England.*—Blissett v. Hart, Willes, 508 (1744); Huzzey v. Field, 2 C. M. & R. 432 (1835). See, however, Churchman v. Tunstall, Hardres, 162 (1659), where a Commonwealth court felt that an exclusive ferry was in restraint of trade. In another bill between the same parties after the Restoration, Lord Hale is said to have decided in favor of the same plaintiff. Huzzey v. Field, 2 C. M. & R. 432 (1835).

[2] Exclusive franchises for ferries are also justified under our American constitutional law in the following cases, among others:

*California.*—Fortain v. Smith, 114 Cal. 494, 46 Pac. 381 (1896).

*Iowa.*—Burlington County Ferry Co. v. Davis, 48 Ia. 133, 30 Am. Rep. 390 (1878).

*Maryland.*—Broadway, etc., Ferry Co. v. Hankey, 31 Md. 346 (1869).

*North Dakota.*—Patterson v. Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 539 (1896).

*South Dakota.*—Nixon v. Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315 (1896).

such franchises from the modern point of view was stated thus: "For centuries such police power has embraced this element of the right to grant an exclusive franchise; and it has been found that, as a general rule, the best results are obtained by granting an exclusive right. Indeed it often is the case that on no other terms will the citizen assume the burdens incident to the operation of a ferry. There is nothing in the history of the English nation or of the American people which warrants the conclusion that this practice has resulted in imposing intolerable burdens upon the public, or has led to other than beneficial results."

**§ 53. Bridges.**

A similar policy has been employed by the State from early times in making provision for long bridges on important lines of through travel. Toll bridges built and maintained under charters giving exclusive rights against competing bridges were once much more common than they are now; and the policy of such arrangements in furtherance of the public service [1] has been vigorously de-

[1] Toll bridges are of such public character that all persons have a right of passage over them upon payment of the established rates.

*United States.*—See Evansville Traction Co. v. Henderson Bridge Co., 134 Fed. 973 (1904).

*California.*—Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535 (1856).

*Kentucky.*—Covington &c. Bridge Co. v. Covington &c. St. Ry. Co., 93 Ky. 136, 19 S. W. 403, 15 L. R. A. 828 (1892).

*New York.*—Thompson v. Matthews, 2 Edw. Ch. 212 (1834).

*Pennsylvania.*—Pittsburg & W. E. Pass. Ry. v. Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511 (1894).

But as the owners of the bridge do not assume the control or possession of goods and passengers conveyed, or passing across the bridge, they do not come under the extraordinary liabilities of common carriers.

*United States.*—Kentucky & L. Bridge Co. v. Louisville & N. R. R. Co., 37 Fed. 567 (1889).

*South Carolina.*—Grigsby v. Chappell, 5 Rich. L. (S. C.) 443 (1852). See § 146, *infra*, as to railway bridges.

fended. In the leading case of the Binghamton Bridge [1] the United States Supreme Court said: "They are deemed beneficial to the country, and this benefit constitutes the consideration and in most cases the sole consideration for the grant. The purposes to be attained are generally beyond the ability of individual enterprise and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in the act of incorporation. The wants of the public are often so imperative that a duty is imposed on government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake."

**§ 54. Bonded warehouses.**

That an exclusive franchise constituting a legal monopoly puts the person who possesses it in the position of public servant should be clear. The leading case upon legal monopoly is Allnutt v. Inglis.[2] The question raised was whether the London Dock Company had a right to insist upon an arbitrary hire for receiving wines into its warehouses, or whether they were bound to receive them there for a reasonable reward only. It appeared that by virtue of the Warehousing Act that company alone had

[1] The Binghamton Bridge, 3 Wall. 51, 18 L. ed. 137 (1865). To the same effect as to the propriety of the grant of special legal privileges in aid of the construction of bridges, see:

*United States.*—City of Leredo v. International Bridge Co., 66 Fed. 246, 14 C. C. A. 1 (1895).

*Connecticut.*—Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co., 17 Conn. 40, 42 Am. Dec. 716 (1845).

*Kentucky.*—Arnold v. Covington &c. Bridge Co., 1 Duv. 372 (1864).

*Massachusetts.*—Central Bridge Corp. v. Lowell, 15 Gray, 106 (1860).

*North Carolina.*—*Contra* Washington Toll Bridge v. Beaufort, 81 N. C. 491 (1879).

*Ohio.*—Young v. Buckingham, 5 Ohio, 485 (1832).

[2] 12 East, 527 (1810).

the legal privilege of taking goods in bond in the port of London. What Lord Ellenborough said in that case deserves careful consideration: "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms. Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose."[1]

**§ 55. Log driving.**

Weymouth v. Penobscot Log Driving Company,[2] a case outside the beaten track, is a modern instance of this principle, that the doctrine of public calling will be extended to any case in which the decisive circumstance of legal monopoly is shown. This was an action brought against the log driving company by a lumberman whose logs had not been taken although he had notified the company in due form. The company requested the court to instruct the jury that the corporation was not under any legal obligation to drive the logs upon request. Mr. Justice Danforth held that the instruction was properly refused under the circumstances. "In this case the charter conferred the privilege of driving, not a part, not such a portion as the company might choose, but 'all' the logs to be driven. This right having been accepted by the

[1] As to the public character of warehouses in general, see the annotation to § 140, *infra*.

[2] 71 Me. 29 (1880).

company, it became a vested and also an exclusive right. It is therefore taken not only from all other corporations, but excludes the owner as well. By its acceptance and exclusion of the owner from the privilege, in justice and in law it assumed an obligation corresponding to, and commensurate with its privilege."[1]

*Topic B. Eminent Domain*

**§ 56. Eminent domain for public purposes.**

It has often been remarked how frequently eminent domain is granted to companies which are conducting public services. Indeed, it has often urged that the reason that such companies may be regulated by law is because they have been endowed with the right of eminent domain, and are therefore quasi-public corporations. This reasoning, however, seems to be inadequate if the matter is sufficiently analyzed, because it is taking the effect for the cause. A legislature can give a railroad or a canal, the right of eminent domain only because the company, irrespective of the enjoyment of that right, is already public in character; for private property, under our constitutional limitations, cannot be taken, even when compensation is given, except for public purposes. A few examples of the businesses for which it has been held eminent domain may be given will make the point plainer, that

[1] Log driving is so affected with a public interest as to justify the grant of various special legal privileges to those engaged in it.

*United States.*—Boom Co. v. Patterson, 98 U. S. 403 (1878).

*Maine.*—Penobscot Log D. Co. v. West Branch D. & R. Dam Co., 99 Me. 452, 59 Atl. 593 (1905).

*Minnesota.*—Cotton v. Mississippi River Boom Co., 22 Minn. 372 (1876).

*New York.*—Matter of Burns, 155 N. Y. 23, 49 N. E. 246 (1898).

And yet as the service is conducted it is not common carriage.

*Michigan.*—Mann v. White River Log & Booming Co., 46 Mich. 38, 8 N. W. 550, 41 Am. Rep. 141 (1881).

*New York.*—Pike v. Nash, 3 Abb. App. Dec. 610, 1 Keyes, 335 (1864).

it is only in public employment that eminent domain may be granted. Thus according to all the cases eminent domain may be granted for such extraordinary businesses as electric plants [1] and telegraph lines,[2] while if it is attempted to give eminent domain for businesses essentially private, such as sugar factories [3] or paper mills,[4] the grant is held unconstitutional.

**§ 57. Tramways.**

It is common knowledge that the tramway was the direct successor of the turnpike and the immediate predecessor of the railroad. It was expected at the outset that like the turnpike it would furnish a highway over which those who had provided themselves with proper wagons and sufficient beasts would haul their goods as

[1] *Georgia.*—Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85 (1906).

*Maine.*—Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472 (1905).

*Missouri.*—State v. Allen, 178 Mo. 555, 77 S. W. 868 (1903).

*New Hampshire.*—Rockingham County Light & Power Co. v. Hobb, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581 (1904).

*New York.*—Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092 (1899).

*Ohio.*—Callen v. Columbus Edison Electric Co., 66 Oh. St. 166, 58 L. R. A. 782, 64 N. E. 141 (1902).

*Pennsylvania.*—Haverford Electric Co. v. Hart, 13 Pa. Co. Ct. 369 (1891). See the full citation of cases establishing that the business of electric lighting is public in character, § 113, *infra.*

[2] *Alabama.*—New Orleans, M. & T. R. Co. v. Southern & A. Telegraph Co., 53 Ala. 211 (1875).

*Arkansas.*—Western Union Telegraph Co. v. Short, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744 (1890).

*New Jersey.*—Trenton & N. B. Tp. Co. v. American & E. News Co., 43 N. J. L. 381 (1881).

*New York.*—Eels v. American Telephone & Telegraph Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640 (1894).

*Utah.*—Postal Telegraph Cable Co. v. Oregon S. L. Ry. Co., 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705 (1901).

*Virginia.*—Western Union Telegraph Co. v. Williams, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429, 19 Am. St. Rep. 908 (1890). See § 157, *infra.*

[3] Getchell v. Benton, 30 Neb. 870, 47 N. W. 468 (1890).

[4] Harding v. Goodlett, 3 Yerg. (Tenn.) 40, 24 Am. Dec. 546 (1832).

they pleased. Unlike the turnpike, however, existing roads could not be utilized and incorporated into the system. Such railways must strike across country for themselves, and eminent domain was consequently necessary to get the right of way without interruptions. It has certainly always been law that when such tramways are thus open to public use they are in the public service and may be given eminent domain.[1] In this way the law was prepared for that very different business of modern railroad operation where the use of the right of way is necessarily confined exclusively to the company conducting the transportation.[2]

**§ 58. Railways.**

When the right of eminent domain was first given to the early railroads its constitutionality was doubted. All such doubts were set at rest by the masterly opinion of Chief Justice Ruffin in Raleigh & Gaston Railroad v. Davis,[3] in the course of which he showed his appreciation of the benefits accruing from the undertaking of public services by private concerns. "An immense and beneficial revolution has been brought about in modern times by engaging individual enterprise, industry and economy in the execution of public works of internal improvement. The general management has been left to individuals whose private interests prompt them to conduct it beneficially to the public, but it is not entirely confided to them. From the nature of their undertaking and the character of the work they are under sufficient responsibilities to insure the construction and preserva-

[1] In Leigh v. Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632 (1903), it is recognized that a tramway constructed to haul out logs will be sufficiently public in character to justify the grant of eminent domain if its proprietors open it to the use of all desirous of availing themselves of it.

[2] See § 144, *infra*.

[3] 2 Dev. & Bat. 451 (1837).

tion of the work, which is the great object of the government." [1]

**§ 59. Pipe lines.**

Upon the same principle it has been held that the right of taking property by eminent domain may be conferred upon a pipe line system constructed for the transportation of oil. The right having been conferred by the West Virginia [2] legislature upon a certain company the act was attacked as unconstitutional, because the taking was not for a public purpose; but the Supreme Court of that State speaking by Mr. Justice Moore said: "It has been decided, time and time again, and is therefore settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, etc., constitutes what is generally known by the name of internal improvements, and gives occasion for the exercise of the right of eminent domain. And other measures of general utility in which the public at large are interested, and which require the appropriation of private property, are within the power where they fall

[1] The subsequent decisions justifying the grant of eminent domain in aid of a public railway are too numerous to be included here in full; the general doctrine is sufficiently shown in the earlier cases, such as:

*United States.*—Secombe v. Milwaukee & St. Paul Ry. Co., 23 Wall. 108, 23 L. ed. 67 (1874).

*California.*—San Francisco A. & S. R. R. Co. v. Caldwell, 31 Cal. 367 (1866).

*Iowa.*—Noll v. Dubuque B. & M. R. R. Co. 32 Iowa, 66 (1871).

*Maryland.*—Shipley v. Baltimore & Potomac R. R. Co., 34 Md. 336 (1871).

*Michigan.*—Swan v. Williams, 2 Mich. 427 (1852).

*New Hampshire.*—Concord R. R. Co. v. Greely, 17 N. H. 47 (1845).

*South Carolina.*—Louisville C. & C. R. R. Co. v. Chappell, Rice, 383 (1839).

[2] West Virginia Transp. Co. v. Volcanic O. & C. Co., 5 W. Va. 382 (1872). "A pipe line company is a common carrier bound to receive and transport for all persons alike all goods intrusted to its care." Giffin v. South West Pa. Pipe Lines, 172 Pa. St. 580, 33 Atl. 578 (1896).

within the reasons underlying the cases mentioned. The charter granted to the West Virginia Transportation Company by special enactment of the legislature, shows that the object was to construct a line for the transportation of petroleum. The charter also established the maximum charges the company should make for transportation of oils. I cannot see the propriety of admitting a railroad or canal or aqueduct to be an internal improvement, and declare this tube highway not to be." [1]

**§ 60. Transmission lines.**

It is difficult to say, as the authorities stand at the present moment, whether the transmission of electric energy to be utilized as power is public in character or not. Of course in particular cases there is no public employment if those engaged in the transmission have made no profession to sell the power to the public in general, but are either using the power transmitted in their own business exclusively or are making special contracts with particular customers.[2] But if the power company holds itself out as ready to serve all customers indifferently to the extent of its capacity it would seem that in such a case the business is sufficiently public to

[1] Although there are now several statutes declaring that pipe lines shall be at the service of the public, there are as yet only a few decisions to that effect; but there are enough to make the prediction safe that the constitutionality of these statutes will be upheld. The cases nearest in point that have been found are subjoined:

*New York.*—Bloomfield & R. Natural Gas Light Co. v. Richardson, 63 Barb. 437 (1872).

*Ohio.*—Re Ohio Valley Gas Co., 6 Pa. Dist. Rep. 200 (1897).

*Pennsylvania.*—Columbia Conduit Co. v. Commonwealth, 90 Pa. St. 307 (1879).

*West Virginia.*—West Virginia Transportation Co. v. Ohio R. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527 (1883).

[2] *Vermont.*—Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818 (1902).

*Virginia.*—Fallsburg v. Alexander, 101 Va. 98, 43 S. W. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855 (1903).

justify the grant of eminent domain to gain right of way for its transmission lines.[1] The modern policy leading the courts to this conclusion, that the business of supplying electricity for power is now public in character is thus fully set forth in a late New Hampshire case [2] which relies much upon the present day demand for power. On the other hand, in a recent Maine case [3] the court insists that the service is not sufficiently necessary to the public to justify eminent domain.[4] But this argument may easily be pressed too far in this subject. A man may make provision for illuminating his premises without the aid of the State, and yet as is conceded by the court, the distribution of electricity for lighting is public in character beyond question.[5]

**§ 61. Elevated conveyors.**

Another method of transportation which is met with in the reports is the elevated conveyor or cable tramway. It is described in one case as consisting of two elevated cables held upon supports so as to run parallel to each other about ten feet apart on which buckets are carried along by means of a moving trolley, one line bringing the buckets in one direction, the other in the other.[6] In

[1] *United States.*—Walker v. Shasta Power Co., 160 Fed. 856 (1908).

*Georgia.*—Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85 (1906).

*New Hampshire.*—Rockingham County Light & Power Co. v. Hobb, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581 (1904).

*New York.*—Re Niagara L. & O. Power Co., 111 App. Div. 686, 97 N. Y. Supp. 853 (1906). See also the full citation of cases relating to electric power, § 114, *infra.*

[2] Rockingham County Light & Power Co. v. Hobbs, *supra.*

[3] Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472 (1905).

[4] State ex rel. v. Superior Court of Thurston County, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672 (1906), is apparently in full accord with Brown v. Gerald, which it quoted with approval.

[5] See § 113, *infra.*

[6] Matter of the Split Rock Cable Road Co., 128 N. Y. 408, 28 N. E. 506 (1891).

that particular case the New York Court of Appeals refused to permit such a road to exercise the power of eminent domain upon the ground that it was wholly engaged in serving the concern which controlled it, transporting rock from its quarry to its works, both termini being upon its private premises. However, it would seem that if such elevated conveyor was really operated as a common carrier offering to transport all freight, that should be offered to it suitable to be carried in buckets, it might well be held in public employment.[1]

**§ 62. Lumber flumes.**

Another unusual public service is the maintenance of a flume through which lumber may be brought from rather distant forests to convenient points. These flumes are commonly constructed by those owning timber lands in the region served; but it is often true that other owners may make use of the flume by paying a proper price. In such a case there would seem to be no objection to granting eminent domain to aid in their construction, as the service would then be public in character. In the leading case involving such flumes,[2] Judge Strahan for the Supreme Court of Oregon said: "The public certainly have an interest in the cheap delivery of the timber, lumber, and other products of the forest, or whatever other commodity may be transported by being floated to cities or other places for consumption." [3]

**§ 63. Mining tunnels.**

Still another enterprise found necessary for the development of natural resources is the mining tunnel. In several of the western States corporations are chartered

[1] See other cases as to mechanical conveyors, § 98, *infra*.

[2] Dalles Lumbering Co. v. Urquhart, 16 Oreg. 67, 19 Pac. 78 (1888).

[3] To the same effect is Maffet v. Quine, 93 Fed. 347 (1899).

for the sole purpose of boring such tunnels and are given the power of eminent domain to pass through the various locations. In defending the grant of this power in the case of Tanner v. Treasury Tunnel, Mining & Reduction Company,[1] Chief Justice Gabbert said: "The number who may avail themselves of the benefit of the tunnels will be limited, but this is merely the result of natural conditions arising from the character and location of mining properties. The use and benefit of the tunnel will be in common, and may be enjoyed by all those whose properties are so located with reference thereto that they may avail themselves if they so desire, of the opportunities thus afforded for the development and operation of their properties." [2]

### *Topic C. Aid from Taxation*

**§ 64. Public purposes of taxation.**

Another basis of the right of public regulation is said to be the receipt by the regulated company of aid from taxation. And indeed it is in public businesses that the various forms of State aid are given, either in the form of direct grant or public guaranty. It is doubtless true, in general, that a business which receives public aid from taxation is a public business, and is subject to public regulation; but again the effect seems to have been taken for the cause. Under our constitutions State aid can be granted only for a public purpose; the character of the enterprise does not result from the grant of State aid, for it must precede it in order to make the grant valid. Thus State aid may be given to such recognized public services

[1] 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106 (1906).

[2] There are several cases substantially to the same effect, among them:

*United States.*—Baillie v. Larson, 138 Fed. 177 (1905).

*New Jersey.*—DeCamp v. Hibernia R. R. Co., 47 N. J. L. 43 (1885).

as telephone lines [1] or irrigation reservoirs,[2] not to mention such obvious cases as street railways [3] and railroad terminals; [4] but State aid may not be given to such private business as a box mill [5] and a coal yard,[6] or even to great enterprises such as foundries [7] and factories.[8]

**§ 65. Gristmills.**

From time immemorial the gristmill has been held to be in public service. There are many early cases which bring out the obligation of the proprietor of a gristmill who is receiving the grain of the community to grind, to serve all without discrimination.[9] So necessary are such mills in the early economy when the immediate country is entirely dependent upon turning its crops into food that the propriety of State aid for such works has seldom been questioned.[10] There is a decision as to gristmills in

[1] Northwestern Telephone Exchange Co. v. Chicago, etc., M. & St. P. Ry. Co., 76 Minn. 334 (1899).

[2] Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. 56 (1896).

[3] Attorney-General v. Pingree, 120 Mich. 550, 79 N. W. 814 (1899).

[4] Sears v. Street Commissioners, 180 Mass. 274, 62 N. E. 397 (1880).

[5] Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185 (1872).

[6] Opinion of Justices, 182 Mass. 605, 66 N. E. 25 (1882).

[7] Loan Association v. Topeka, 20 Wall. 655, 22 L. ed. 455 (1874).

[8] Cole v. La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. 416 (1884).

[9] *United States.*—Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876), *semble.*

*Alabama.*—Sadler v. Langham, 34 Ala. 311 (1859).

*Georgia.*—Loughbridge v. Harris, 42 Ga. 500 (1871).

*Maine.*—State v. Edwards, 86 Me. 102, 41 Am. St. Rep. 528 (1893).

*Nebraska.*—Getchell v. Benton, 30 Neb. 870, 47 N. W. 468 (1890).

*Virginia.*—Tuckahoe Canal Co. v. Tuckahoe Ry. Co., 11 Leigh, 42 (1840), *semble.*

*West Virginia.*—West v. Rawson, 40 W. Va. 480, 21 S. E. 1019 (1895).

[10] Upon similar principles eminent domain may be given to aid in the construction of the works of a gristmill, particularly to acquire flowage rights.

*Illinois.*—Gaylord v. Sanitary District, 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235 (1903).

*Kentucky.*—Shackelford's Heirs v. Coffey, 4 J. J. Marsh. 40 (1830).

*Massachusetts.*—Boston & Roxbury Mill Corp. v. Newman, 12 Pick. 467, 23 Am. Dec. 622 (1832).

the Supreme Court of the United States [1] in which the tests are discussed by which the public character of a business may be judged. The issue was whether an issue of bonds made to aid in the construction and completion of a steam custom gristmill within the township, was valid. The Constitution empowered the execution of bonds for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto or taking stock therein, or for other works of public improvement. Mr. Justice Hunt in delivering the opinion of the court said in part: "Does such an establishment fall within the description of other works of internal improvement? It would require great nicety of reasoning to give a definition of the expression internal improvement which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in or out of the town upon a railroad, while they were refused the means of grinding their wheat."[2]

## § 66. Sawmills.

There is some evidence that in certain States sawmills are regarded as public services also. They are thus

*Tennessee.*—Harding v. Goodlett, 3 Yerg. 41, 24 Am. Dec. 546 (1832).

But the mill must be conducted as a public one or special rights may not be given.

*Georgia.*—Loughbridge v. Harris, 42 Ga. 500 (1871).

*Vermont.*—Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398 (1871).

[1] Township of Burlington v. Beasley, 94 U. S. 310, 24 L. ed. 161 (1876).

[2] In view of this decision it is rather curious that in Osborne v. Adams County, 106 U. S. 181, 27 L. ed. 129 (1882), it was held that a steam power gristmill could not be aided under a Nebraska statute, but the terms of the Nebraska acts were not so broad. In Blair v. Cuming County, 111 U. S. 363, 28 L. ed. 457 (1884), strangely enough a water power gristmill was held within the Nebraska statute.

grouped with gristmills in State v. Edwards,[1] Haskell, J., saying, "Mills for the grinding of grain and for the sawing of lumber for all comers have been aided or established by the legislature from the earliest Colonial times. Those mills were usually water mills; but it is of no moment what the propelling power may be. They have always been considered so necessary for the existence of the community that it was proper for government to foster or maintain them; and in the absence of government aid, the individual proprietor, not pretending to serve the public, might maintain such mills as private mills, free from legislative interference, precisely as he might maintain a store, shop or other private business; but when such proprietor makes his mill public, assumes to serve the public, then he dedicates his mill to public use and it becomes a public mill, subject to public regulation and control. He is not compelled to continue such public use, but so long as he does, he becomes a public servant and may be regulated by the public." [2]

**§ 67. Drainage.**

Drainage, on the other hand, is an example of a public necessity [3] that is almost always provided for by the State itself in some other way than by the chartering of public service companies. Indeed it is usually arranged for by governmental agencies, such as reclamation districts, with the extraordinary power of levying assessments upon those benefited.[4] It is possible that a public corporation might be duly empowered to construct a drainage

[1] 86 Me. 102, 29 Atl. 947, 25 L. R. A. 504, 41 Am. St. Rep. 528 (1893).

[2] Sawmills are included in the list of public mills in Gaylord v. Sanitary Dist., 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235 (1903).

[3] See Laguna Drainage District v. Martin Co., 144 Cal. 209, 77 Pac. 933 (1904).

[4] Jenal v. Green Island Draining Co., 12 Neb. 163, 10 N. W. 547 (1881).

system [1] and take such reasonable profit as it might get by the charges it could collect from those who wished to avail themselves of the benefit of its system. But it is beyond the range of possibility that any corporation of such sort can be given the power to coerce unwilling customers to deal with it by compulsory assessments.[2]

### § 68. Sewerage.

Sewerage systems likewise are usually constructed by governmental bodies so that examples of the conduct of this service by private corporations are practically unknown. But it is plain that in their conduct by a governmental body the principles of the public service law must be obeyed. Thus in a recent case [3] the city of Mobile was enjoined against maintaining a schedule outrageously discriminatory. Mr. Justice Haralson saying, emphatically, "These sewers of the city are for the public at large and every one should be permitted to use them without any discrimination in charges against him. The franchise to construct sewers being in the nature of a public use, the duty is on the city to supply sewerage at rates to all impartially on reasonable terms." [4]

### § 69. Cemeteries.

The absolute necessity of public cemeteries is obvious. This necessity may be met either by cemeteries owned directly by the government or by chartered corporations. Such corporations are rarely empowered to take private profit from the conduct of the cemetery, but are obliged to devote their receipts to the purposes of the cemetery.[5]

[1] See O'Reiley et al. v. Kankakee Valley Draining Co., 32 Ind. 169 (1869).

[2] See Kean v. Driggs Drainage Co., 45 N. J. L. 91 (1883).

[3] Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445 (1901).

[4] See Opinion of the Justices, 150 Mass. 592, 596, 24 N. E. 1084, 8 L. R. A. 487 (1890).

[5] See Davis v. Coventry, 65 Kans. 557, 70 Pac. 583 (1902).

Such being the case the law concerning them is mostly that relating to public charities which is outside the scope of this treatise. It may be noted, however, that it is common to exempt such cemeteries from taxation and these exceptions are liberally construed in favor of the cemetery.[1] Moreover, it is possible to have cemetery corporations which are justified in distributing their profits to their stockholders; and it would seem on the decisions that these may receive State aid in every form provided that their privileges are open to all upon equal terms.[2] "But it is a matter of common knowledge that there are many cemeteries which are strictly private; in which the public have not and cannot acquire the right to bury." Clearly the proprietors of such cemeteries cannot constitutionally receive State aid.[3]

**§ 70. Hospitals.**

The same situation exists as to hospitals. These are usually organized as public charities and the discussion of the law relating to them is again outside the scope of this treatise, which is confined to such corporations engaged in public service as are entitled to take private profit. Nevertheless there may be hospitals of this type which are open to all comers with reasonable restrictions,[4] and it would seem that such hospitals might be given such aid from the State as is deemed desirable, particularly exemption from taxation. Such a hospital would seem to be public in character within the definition of that term given in a leading case[5] dealing with the propriety of

[1] Mt. Auburn Cemetery v. Cambridge, 150 Mass. 12, 22 N. E. 66, 4 L. R. A. 836 (1889).

[2] See Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358 (1894).

[3] Evergreen Cemetery Assn. v. Beecher, 53 Conn. 551, 5 Atl. 353 (1885).

[4] See People ex rel. Burnham Hospital, 71 Ill. App. 246 (1896).

[5] Quoted from County of Hennepin v. Brotherhood of Gethsemane, 27 Minn. 460, 8 N. W. 595 (1881).

such exemptions. "The word 'public' has two proper meanings. A thing may be said to be public when owned by the public and also when its uses are public."

*Topic D. Use of Public Highways*

**§ 71. Public purposes in highway use.**

Many public service companies are granted special privileges in public highways of one sort or another. And these rights in the streets have often been urged as a reason for holding the user subject to special regulation by law. But here again the point may be urged that unless these were public purposes it would be unjustifiable to give them special rights. Thus although special franchises may be given to gas companies to lay pipes through public streets [1] and to electric companies to string their wires along public ways [2] these are to be defended only by showing that the businesses themselves are public in character. And it is generally true that the use of highways may be given in the furtherance of any public purpose which is not destructive of its use as a highway, although some uses are so unusual as to constitute an additional servitude for which compensation must be made to the owner of the fee. On the other hand, it would seem clear that special rights in public highways should not be given for private enterprises in which the public has no rights to service even if compensation were provided, such as advertising stands [3] or private scales.[4] The en-

[1] *Indiana.*—See Indianapolis v. Gas Co., 66 Ind. 396 (1879).

*Massachusetts.*—Boston v. Richardson, 13 Allen, 160 (1866).

[2] *New Jersey.*—Meyers v. Hudson County Electric Co., 63 N. J. L. 573, 44 Atl. 713 (1899).

*New York.*—Palmer v. Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672 (1899).

[3] State v. St. Louis, 161 Mo. 371, 61 S. W. 658 (1901).

[4] Emerson v. Babcock, 66 Ia. 257, 26 N. W. 656, 55 Am. Rep. 273 (1885).

joyment of highway privileges is therefore again a case of consequence rather than cause, since these rights may only be given for the furtherance of a business already determined to be public in character.

**§ 72. River improvements.**

The improvement of navigable waters furnishes one of the most striking illustrations of the use of public highways in enterprises designed to promote the service of the public. The improvement of rivers in particular has been the subject of great expenditures.[1] This partial canalization is often accomplished by dredging a deeper channel by mechanical means or scouring it by a jetty system; or it may be brought about by an opposite system of slack waters impounded by dams with weirs, and canals with locks. These works are usually done by the government itself which, it may be noted, often does not charge toll for their use. Still it may be done by private companies specially chartered, in which case the law is plain that they must permit all proper boats to pass without discrimination upon the payment of reasonable charges.[2]

**§ 73. Booms.**

The boom companies which impound logs floated downstream for the benefit of their owners are within the same principles. As was said in one leading case—Cotton v.

[1] The following cases among others relating to river improvements bear out the text:

*Illinois.*—People ex rel. v. Kankakee River Improvement Co., 103 Ill. 491 (1882).

*Michigan.*—Manistee River Improvement Co. v. Lamport, 49 Mich. 442, 13 N. W. 810.

*New York.*—Matter of Burns, 155, N. Y. 23, 49 N. E. 246 (1898).

*Wisconsin.*—Yellow River Improvement Co. v. Wood County, 81 Wis. 554, 51 N. W. 1004, 17 S. R. A. 92 (1892).

[2] See the language in:

*United States.*—Sands v. Manistee River Improvement Co., 123 U. S. 288, 31 L. ed. 149 (1887).

*Texas.*—Buffalo Bayou Ship Channel v. Milby & Dow, 63 Tex. 492, 51 Am. Rep. 668, (1885).

Mississippi & Rum River Boom Company [1]—"The Mississippi River is, among other things, a public highway for the running of logs, and a boom company may properly be regarded as an improvement of the highway, an improvement, the purpose and effect of which are to render the highway more available and valuable for the running of logs." [2]

**§ 74. Sluices.**

Other minor improvements sometimes utilized in connection with river transportation are sluices, slides, rollers, or planes by which portages around obstacles are avoided. There is a case [3] as to one such slide which holds properly enough that even if the proprietors are permitting passage to all for a regular toll they are not common carriers. It is obviously true that they are not carriers at all because they do not assume possession of what passes through. Nevertheless it should be clear that they are in common employment and obliged to let all use the improved highway at the established tolls.

**§ 75. Turnpikes.**

It has already been made sufficiently obvious that the turnpikes although owned by corporations conducting them for profit were always regarded as public highways over which all might pass by paying the established

[1] 22 Minn. 372 (1876).

[2] See also to the same effect:

*United States.*—Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206 (1878); Patterson v. Mississippi & R. R. Boom Co., 18 Fed. Cas. 10829 (1875).

*Maine.*—Lawler v. Baring Boom Co., 56 Me. 443 (1869).

*Minnesota.*—International Boom Co. v. Rainy Lake River Boom Co., 97 Minn. 513, 107 N. W. 735 (1906); Northwestern Improvement & Boom Co. v. O'Brien, 75 Minn. 335, 77 N. W. 989 (1899).

*Pennsylvania.*—West Branch Lumbermen's Exchange v. Fisher, 150 Pa. St. 475, 24 Atl. 735 (1892).

*Wisconsin.*—Underwood Lumber Co. v. Pelican Boom Co., 76 Wis. 76, 45 N. W. 15 (1890).

[3] Queen v. McFarlane, 7 Can. 216 (1882).

tolls.[1] This idea went so far that it was even held justifiable for the legislature to authorize a turnpike company to take over existing public highways and operate them as part of the turnpike system, charging tolls for passage, and to do this without paying compensation to the abutting owners as for a change in the character of the use. Notwithstanding what had been a free highway before and was now a turnpike with toll gates, the court held that it was still a public highway over which all might pass, and it was for the legislature to judge whether it was desirable to have the public service maintained in this way.[2]

### § 76. Street railways.

Of course the most obvious illustration of the coincidence of street privileges with public service is that of street railways with their special rights to occupy the public streets. And this is seized upon in various cases [3] as the explanation of their obligations to the public. But this sort of explanation although it contains a certain truth [4] will not account for the fact that a passenger

[1] The following cases among many others show that turnpikes were commonly regarded as public in character:

*United States.*—Covington & L. Turnpike Road v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. 198 (1896).

*Colorado.*—Virginia Cañon Toll Road Co. v. People, 22 Colo. 429, 45 Pac. 398, 37 L. R. A. 711 (1896).

*Kentucky.*—Winchester &c. Turnpike Road Co. v. Croxton, 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177 (1898).

*New York.*—Davis v. Mayor, 14 N. Y. 506, 67 Am. Dec. 186 (1856).

[2] The following cases are sufficient evidence to this rule:

*California.*—Blood v. McCarty, 112 Cal. 561, 44 Pac. 1025 (1896).

*Michigan.*—Attorney General v. Detroit & Erin Plank Road Co., 2 Mich. 138 (1851).

*New Hampshire.*—State v. Hampton, 2 N. H. 22 (1819).

*Ohio.*—Chagrin Falls Co. v. Cane, 2 Oh. St. 419 (1853).

*Vermont.*—Panton Turnpike Co. v. Bishop, 11 Vt. 198 (1839).

[3] See for one example State v. Spokane Ry. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739 (1898).

[4] See § 259, *infra*.

railway laid across country without use of the streets is subject to precisely the same law as one laid upon the highway. As is said in East Omaha Street Railway Company v. Gondola [1] by Chief Justice Post in replying to the contention that the particular railway was not a common carrier as its right of way was constructed upon its own private property: "That proposition is not it seems to us entitled to serious consideration. The defendant by undertaking to transport passengers for hire between Courtland Beach and the City of Omaha assumed the relation towards its passengers of a common carrier and the character of the easement in the right of way is wholly immaterial." [2]

**§ 77. Subways.**

Of late years in many of the largest cities subways have been constructed beneath principal streets. These have usually been built in theory at least by the municipalities themselves as special highways and then exclusive rights for a term of years upon proper compensation are given to some traction line in analogy to street franchises for surface railways. In litigation challenging the validity of this method of constructing the Boston subway,[3] it was held that although these highways were not free to all they provided facilities for public passage, and that the building of the subway for the carriage of such passengers as pay the regular fare was therefore a proper use of public credit.[4]

**§ 78. Wire conduits.**

A late method of permitting the use of the streets by

[1] East Omaha Ry Co. v. Godola, 50 Neb. 906, 70 N. W. 491 (1897).

[2] See § 227, *infra*, for numerous citations.

[3] Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610 (1896).

[4] See also City of New York v. Interborough R. T. Co., 125 N. Y. App. D. 437, 108 N. Y. Supp. 885 (1908).

electrical companies is by authorizing the construction of a duct large enough to hold the wires of various companies. The electrical subway company chartered for such a purpose may or may not be given an exclusive privilege against the construction of other similar enterprises; it is sufficient that it has a practical monopoly. For the purpose of accommodation of various interests full power of control is often reserved by the governmental authority which grants the rights. And sometimes the obligations of the conduit company to serve proper applicants are defined in its charter.[1] In the leading case [2] it was held that such a corporation might properly be given the right to construct its subway under public streets although the franchise had no provision giving the electric companies the right to use them. But the court held that the business was public in character and the use proposed to make of the streets was a public one. "The corporation is not a mere private one for personal gain only, but the business in which it is engaged is for the benefit of, and used for the benefit of the general public, and in which many companies are engaged all over the United States and elsewhere." It would seem plain, therefore, that such a conduit company is a public service itself and may be obliged to give space to any applicant company having lawful power to extend its wires through the city.

**§ 79. Pole lines.**

Upon the analogy of the wire conduit which may either

[1] In Brush Elec. Illuminating Co. v. Consolidated T. & E. Subway Co., 15 N. Y. Supp. 81 (1891), it is held that such explicit provisions are indispensable. See also Re Long. Acre Light & P. Co., 117 App. Div. 80, 102 N. Y. Supp. 242 (1907).

[2] State ex rel. National Subway Co. v. St. Louis, 145 Mo. 551, 46 S. W. 981 (1898), overruling State ex rel. St. Louis Underground Service Co. v. Murphy, 134 Mo. 548, 34 S. W. 51 (1896); see also Purnell v. McLane, 98 Md. 589, 56 Atl. 830 (1904).

be constructed by an electric company engaged in public service for its own exclusive use or which may be conducted for the use of other companies subject to the public service law, is the case of the pole line above ground. These to be sure are generally erected by an electric company for its own use; but the other alternative is not impossible. And the company maintaining a pole line may have so far undertaken to permit other companies to string wires on its poles that it will be compelled to do so for subsequent applicants. Montgomery Light & Water Power Company v. Citizens' Light, Heat and Power Company,[1] looks that way, holding a franchise provision so providing enforceable.[2]

**§ 80. Constitutional situation as to special privileges.**

No attempt will be made to write a treatise upon constitutional law here in a few paragraphs, for it is recognized that one cannot make safe rules for any branch of the law without the many qualifications which exceptional cases dictate. Yet as the subject of constitutional law touches that of the public services so intimately, it is fair to suggest what seems from this inquiry the unifying principle, although in any such generalization which ignores details, there will necessarily be a certain per cent of error. First of all it is clear from the cases already cited that none of these special grants—exclusive franchise, eminent domain, State aid, or highway franchises—can be extended except for a public purpose. This is the leading principle in the constitutional law relating to each of these subjects, although there are some negligible variations between the various sets of authorities as to what is a public purpose, due probably to the fact that the question has not been considered as a whole, rather than

[1] 147 Ala. 359, 40 So. 981 (1906). N. Y. App. Div. 837, 101 N. Y. Supp. 1 (1906).
[2] See also Kuhn v. Knight. 115

to any inherent differences as to what constitutes a public purpose in these various subjects. When it is a question of giving State aid in any form to a business enterprise privately owned this public purpose must appear. This does not mean that such State aid may always be given to the proprietors of all public services. But unless the public may enjoy the service furthered as of right, can the aid of its owners truly be said to be a public purpose. There are several variations from this rule in the authorities; but properly considered they are negligible in generalization. It is therefore only the business which is public in character which the State may aid in furtherance of public purposes. For such public businesses must give the public the service which the law requires of them. This means that the public businesses exist independently of State aid and have material differences from private businesses which it will be necessary to determine in subsequent chapters. For the present it will be sufficient to put forward as the working hypothesis that this difference lies in external conditions. That where there is from any cause a permanent condition of virtual monopoly, whether or not the government has had any hand in establishing that monopoly, the State must take control of the situation for the protection of the public, and may constitutionally do whatever the situation requires. The difference between public calling and private calling is thus inherent in the nature of things. This is because the conditions which permit competition or produce monopoly are external matters with which the law must deal as existing facts.

## CHAPTER III

### NATURAL MONOPOLY

§ 90. Natural limitation creates public employment.

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**§ 90. Natural limitation creates public employment.**

It is common knowledge that there are certain businesses which are so affected with a public interest that those who undertake them must serve the public properly. It is thus the character of the business which makes it public and this character it takes from the conditions surrounding the business. This is most clear in the case of those businesses which have by reason of physical limitation a natural monopoly. In such circumstances the ordinary laws of competition either practically fail to operate, or act but feebly. Natural limitation is used here in its widest sense. It is not confined to those obvious cases first considered where there is actual restriction of supply, as in the case of water supply or natural gas. It includes those physical limitations in the character of the supply which involve difficulties in its distribution, as in the case of gas supply or electric energy. It includes also those most fundamental limitations of space and time. It is the scarcity of sites that gives the grain elevator or the stock yard its practical monopoly. And it is because of the instant need of the customer that the telegraph and the ticker are classed as public necessities. As all these limitations are inherent, all of these instances are cases of natural monopoly. And it is submitted that since this monopoly is essentially permanent, the situation requires the stern regulation of coercive law for those who undertake these services in order to protect those who must deal with them or go without adequate service.

*Topic A. Restriction of Supply*

**§ 91. Limitation of the sources of supply.**

The case for public service is plainest in those few utilities where there are natural limitations upon the sources of supply which are essential to the business.

This situation in itself gives some degree of monopoly to those who control the sources of supply most accessible to their market in preventing effective competition with the local service. Thus those who control the most advantageous watershed have a natural monopoly of the supply of water in a given district; and so by established law they must supply all that apply to the extent of their undertaking. For the same reason those who have preempted the natural gas fields must deal without discrimination with the public which they have assumed to serve therefrom. It would be going too far doubtless at the present time to claim that it is accepted law that natural limitation of a public necessity necessarily makes its general sale public employment. So long as those who have virtual monopoly of the anthracite coal fields are left free to charge what prices they please, the principle is in abeyance. And so long as those who have virtual control of the petroleum oil wells are left free to discriminate as they please between their customers, the duty is not recognized. But it may be that in the fullness of time these now all too powerful purveyors to public needs will be brought within this law and subjected to public regulation.

**§ 92. Waterworks.**

The most conspicious example of an employment which is public in character by reason of the natural monopoly which it enjoys is the waterworks. The established company possessing as it does almost invariably the water supply which is most accessible has a natural monopoly of the local market; indeed for that reason it almost always has in fact a permanent monopoly, no other company being able to enter its field upon equal terms. As one of the earliest needs of a community is a supply of water for domestic uses, it has been always obvious that

this service is a public utility. Accordingly it was conceded almost from the first that the situation demanded coercive law. The extent to which this law takes the disposition of the business out of the discretion of the corporation which provides the supply may be seen in Haugen v. Albina Water Company,[1] a late illustration. The defendant company laid a main through the street upon which the applicant lived, refusing, however, to supply water to persons living between certain limits. But Mr. Justice Lord said: "In such case, how can the defendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? If the supplying of a city or town with water is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head."[2]

[1] 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

[2] In these cases the language used by the court in declaring that the supply of water is public in character is particularly significant:

*United States.*—Spring Valley Water Works v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. 48 (1884); Long Island Water Supp. Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. 718 (1897); Spring Valley Water Works v. San Francisco, 124 Fed. 574 (1903).

*Alabama.*—Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445, B. & W. 417 (1900).

*California.*—Spring Valley W. W. v. San Francisco, 82 Cal. 286, 16 Am. St. Rep. 116 (1890).

*Florida.*—City of Tampa v. Tampa Water Works Co., 45 Fla. 600, 34 So. 631 (1903).

*Georgia.*—Freeman v. Macon G. & W. Co., 126 Ga. 843, 56 S. E. 61 7 L. R. A. (N. S.) 917 (1906).

*Illinois.*—Carlyle v. Carlyle Water L. & P. Co., 52 Ill. App. 577 (1893).

*Iowa.*—Des Moines v. Des Moines Water Works Co., 95 Iowa, 348, 64 N. W. 269 (1895).

*Kansas.*—Asher v. Hutchinson Water L. & P. Co., 66 Kans. 496, 71 Pac. 813, 61 L. R. A. 52 (1903).

*Kentucky.*—Franke v. Paducah Water Supply Co., 88 Ky. 467, 11 S. W. 432, 718, 4 L. R. A. 265 (1889).

*Maine.*—Kennebec Water District v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856 (1902); Brunswick & T. Water District v. Maine Water Co., 99 Me. 371, 59 Atl. 537 (1904).

*Massachusetts.*—Lumbard v. Stearns, 4 Cush. 60 (1849).

**§ 93. Irrigation systems.**

That irrigation is a service which is public in character is well established.[1] The obvious explanation of this would seem to be the natural limitation of the water supply in those regions where irrigation systems must be constructed. It should be noted, however, that some of the courts in those States in their desire to put irrigation canals under public obligation, at first analogized them to common carriers. What led them to this comparison was the idea that the users of water were in effect appropriators, and the canal companies were carrying the appropriated water to its owners. But the forced character of this analogy to common carriage is now recognized. The most accurate statement of the actual situation is to be found in the leading case of Slosser v. Salt River Valley Canal

*Missouri.*—State ex rel. v. Joplin Water Works Co., 52 Mo. App. 312 (1893).

*Montana.*—State v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574 (1896).

*Nebraska.*—American Water Works v. State, 46 Neb. 194, 64 N. W. 711, 50 Am. St. Rep. 610, 30 L. R. A. 447 (1895).

*New Jersey.*—Long Branch Com. v. Tintern Manor Water Co., 71 N. J. Eq. 790, 62 Atl. 474 (1906).

*New York.*—Rochester v. Rochester & Lake Ontario Water Co., 189 N. Y. 323, 82 N. E. 154 (1907).

*North Carolina.*—Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240 (1898).

*Pennsylvania.*—Brymer v. Butler Water Co., 179 Pa. St. 231, 36 Atl. 249, 36 L. R. A. 260 (1897).

*Tennessee.*—Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841, B. & W. 468 (1897).

*Texas.*—City Water Co. v. State (Tex. Civ. App.), 33 S. W. 259 (1895).

*Vermont.*—Re Barre Water Co., 62 Vt. 27, 20 Atl. 107, 9 L. R. A. 195 (1889).

*Washington.*—Tacoma Hotel Co. v. Tacoma L. & Water Co., 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35 (1891).

[1] *United States.*—Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. 56 (1896); San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. 804 (1899); Souther v. San Diego Flume Co., 121 Fed. 347, 57 C. C. A. 561 (1903); Boise City Irrigation Co. v. Clark, 131 Fed. 415, 65 C. C. A. 399 (1904).

*Arizona.*—Gould v. Maricopa Ca-

Company [1] where Mr. Justice Sloan said: "Some of the courts in the arid States have chosen to regard such corporations as, in a sense, public carriers. Inasmuch as, in the nature of things, their ability to supply the public with water must be limited, and as the consumers under the law of prior appropriation are not and cannot be upon the same footing as to their rights to the use of such water, the statutory term 'public acequia' much more accurately describes their character and status."

## § 94. Natural gas.

The conditions surrounding the supply of natural gas present natural monopoly in its most extreme form. The fields from which such gas can be drawn are extremely limited, so much so that in the case of any particular community there will not usually be many sources available for its supply. This is true although there may be other fields in the surrounding territory which are not beyond the possibility of piping, since the product has such a high value in any community that it would not usually be commercially advisable to construct expensive lines to convey it to distant communities instead of selling

nal Co., 8 Ariz. 429, 76 Pac. 598 (1904); Salt River Valley Canal Co., v. Nelssen, 10 Ariz. 9, 85 Pac. 117, 12 L. R. A. (N. S.) 711 (1906).

*California.*—Price v. Riverside Canal & Irr. Co., 56 Cal. 431 (1880).

*Colorado.*—Wheeler v. No. Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603 (1887).

*Idaho.*—Wilterding v. Green, 4 Ida. 773, 45 Pac. 134 (1896).

*Kansas.*—Western Irrigation & L. Co. v. Chapman (Kan.), 59 Pac. 1098 (1899).

*Montana.*—Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 755 (1897).

*Nebraska.*—Paxton & H. Irrigation Co. v. Farmers' & M. Irr. Co., 45 Neb. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585 (1895).

*Oregon.*—Umatilla Irrigation Co. v. Barnhart, 22 Oreg. 389, 30 Pac. 37 (1892).

*Texas.*—Moore-Cortes Canal Co. v. Gyle, 36 Tex. Civ. App. 442, 82 S. W. 350 (1904).

*Washington.*—Prescott Irrigation Co. v. Flathers, 20 Wash. 454, 55 Pac. 635 (1899).

[1] 7 Ariz. 376, 65 Pac. 332 (1901).

it in the most accessible market. These conditions in themselves make the inclusion of this service within the class of public services certain; indeed in relation to such companies the law of public services has been pressed to the furthest extremes, as will be seen. In one such case, State ex rel. Wood v. Consumers' Gas Company [1] in brushing aside the excuses of the company, Mr. Justice Hadley insisted upon unquestioning obedience to the whole public service law. "The principle here announced is not new. It is as old as the common law itself. It has arisen in a multitude of cases affecting railroad, navigation, telegraph, telephone, water, gas, and other like companies, and has been many times discussed and decided by the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is affected with a public interest, it must supply all alike, who are like situated, and not discriminate in favor of, nor against any." [2]

**§ 95. Water powers.**

It would seem that a power company organized to impound water and dispose of its flow is in practically the same position as an irrigation company, so far at least as this factor of natural monopoly is concerned. Indeed the

[1] 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245 (1901).

[2] From the list of cases which recognize that the purveying of natural gas is affected with a public interest a few are selected for insertion here because their language is significant:

*Indiana.*—Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321 (1892).

*Kansas.*—La Harpe v. Elm Township G. L. F. & P. Co., 69 Kans. 97, 76 Pac. 448 (1904).

*New York.*—Bloomfield & R. N. G. Co. v. Richardson, 63 Barb. 437 (1872).

*Ohio.*—Toledo v. Northwestern Ohio Natural Gas Co., 5 Oh. C. C. 577 (1890).

*Pennsylvania.*—Johnson's Appeal, 115 Pa. St. 129, 7 Atl. 167 (1886).

*West Virginia.*—Charleston Nat. Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410 (1901).

limitation is even more marked, since not only must there be an ample supply from the stream impounded but a considerable fall within a short distance. Thus the possession of water power is perhaps the clearest example of natural monopoly, as people in general are just beginning to realize now that the most advantageous powers have been pre-empted by the farseeing few. All that remains that can be done is to protect the public from the abuse of this monopoly when the power is offered to the public for resale by those who have acquired it. The law regulating the service of the public by those who are engaged in a business so circumstanced as to be public in character seems peculiarly necessary for the protection of the interests of the future against the abuse of the grants of the past. It would seem, therefore, that the law ought to be in readiness to deal with the disposition of water with the potentiality of power. In Sammons v. Kearney Power & Irrigation Company,[1] indeed, we have a case where a development company had entered into a contract with one taker of power, agreeing not to sell power to any other taker intending to compete with the original taker in the generation of electricity for sale. This contract was unanimously held void as inconsistent with the public duty, Commissioner Albert saying: "In the case at bar we are dealing with an irrigation company—a quasi-public corporation. It is also a governmental utility. To the extent of its capacity it is bound to furnish water from its canal to persons desiring to use it on equal terms and without discrimination." But in the only other recent case squarely on the point a contrary view is taken as to the direct supply of water power. In Minnesota Canal & Power Company v. Koochching Company[2] the court held

[1] 77 Neb. 580, 110 N. W. 308, 8 L. R. A. (N. S.) 404 (1906).

[2] 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638 (1906). The most of these modern au-

that the creation of a water power for sale to mills located on the premises was not a public use, as a hydro-electric development is. "Water power from the wheels must be

thorities are concerned with hydro-electric power development, but it is not perceived by the writer that these differ fundamentally in principle from the direct sale of water from the power canal. Massing these cases together to emphasize the point, the following cases hold water power distribution to be public in character provided that the proprietors profess as their principal business the sale of power to others, not the utilization of it in their own industries.

*United States.*—Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660 (1908).

*Georgia.*—Jones v. No. Georgia Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122 (1906).

*Idaho.*—Hollister v. State, 9 Ida. 8, 71 Pac. 541 (1903).

*Indiana.*—Stoy v. Indiana Hydraulic Power Co., 166 Ind. 316, 76 N. E. 1057 (1906).

*Montana.*—Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567 (1907).

*New Hampshire.*—Rockingham L. & Power Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581 (1904).

*New York.*—Re East Canada Cr. Electric L. & Power Co., 49 N. Y. Misc. 565, 99 N. Y. Supp. 109 (1905).

*Oregon.*—Grande Ronde Electric Co. v. Drake, 46 Oreg. 243, 78 Pac. 1031 (1905).

See *contra*, holding such power development not even public in character:

*Maine.*—Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526 (1905).

*Washington.*—State ex rel. v. Superior Court, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672 (1906), and cases cited.

The cases holding that those who utilize their own water power in their own private business have no right to enjoy eminent domain, are plainly distinguishable as there is no public profession.

*Illinois.*—Gaylord v. Sanitary Dist., 204 Ill. 576, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235 (1903).

*Michigan.*—Berrien Springs Water Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438 (1903).

The same is true in dealing with the remaining cases relating to hydro-electric power development; it should be recognized that the cases are entirely correct which hold invalid the grant of legal privileges to the proprietors of those power developments which do not profess to sell to the public indiscriminately. See:

*Vermont.*—Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818 (1902).

*Virginia.*—Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855 (1903).

used at the wheels," said Mr. Justice Elliot for a bare majority, " and the actual result necessarily is that a very few individuals will use the power for manufacturing purposes to the exclusion of all others."

### *Topic B. Scarcity of Sites*

**§ 96. Scarcity of advantageous sites.**

It has already been remarked that the sites upon which certain services can be conducted to best advantage are few in number. The necessity of these locations to proper conduct of the business may be so great that those who are possessed of these sites may well be said to enjoy a natural monopoly, since if others venture to establish themselves at all at such disadvantage, their competition will be comparatively ineffectual. At all events those in the favorable locations could exact higher prices than would be fair, were it not for the fact that the law intervened. Of course the importance of the site depends upon the character of the business. Terminal facilities operated in connection with railway systems furnish the most striking examples of this importance of particular sites. To a lesser extent this is true of those services which although not dependent upon an exact location are operated with peculiar advantage in particular areas, such as warehouses in business districts.

**§ 97. Grain elevators.**

The grain elevator furnishes the principal case upon the subject of the legal regulation of established monopoly. Any discussion of the foundations of our industrial relations must give chief place to the case of Munn v. Illinois [1]

[1] 94 U. S. 113, 24 L. ed. 77 (1876). Munn v. Illinois is undoubtedly one of the leading cases in American constitutional law. It has been cited with approval hundreds of times, both in the Federal and the State courts. See Rose's Notes on U.S.Sup.Ct.Rep., vol. 9, pp. 21–55.

since it is recognized that this case has within its view all public duties and all private rights which are established and respected under our system of government. Upon the right understanding of this case depends the true conception of our general theory of the function of State regulation.

The facts of the case are worth careful examination. The General Assembly of Illinois in 1871 had passed a statute which provided a maximum rate beyond which no person should charge for the storage of grain in public elevators. The firm of Munn & Scott refused to obey the act, and accordingly were fined. They appealed the case from court to court until the Supreme Court of the United States was reached. The Supreme Court confirmed all the decisions which had been given below and decided against the defendant. It is to be noted that the proprietors of this elevator had no legal privileges whatsoever. The elevator of Munn & Scott stood upon land bought by them by private treaty; they had no rights in the public streets; they had no aid from the public treasury; they were not even incorporated. Here, then, is a case that raises the question of virtual monopoly without the complication of legal monopoly.

And as a general problem, Mr. Justice Waite discusses it: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris*, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed

with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control." [1]

Why is it true that in the elevation of grain, monopolistic conditions generally prevail? Not by accidental coincidence, but by natural limitation. The facts are that in any given community the plots of ground upon which this business may be conducted with convenience and efficiency are few and concentrated. In this case of the Chicago elevator those are the lots which both border upon the river and are adjacent to the terminals of the railroads entering the city. Thus grain elevators because of the nature of the traffic must be placed within a limited area, and thereby they have a virtual monopoly over their business. Their number cannot be indefinitely multiplied, and competition cannot effectively regulate their business. And where the regulation of competition ceases to work efficiently the law must step in.

### § 98. Mechanical conveyors.

It would seem that the same law would apply to any mechanical conveyor for transferring bulk freight in transit. In one case of this sort [2] a mechanical conveyor was operated upon a railroad wharf by a separate company called the Erie Coal Transfer Company. This was

[1] Munn v. Illinois, *supra*, was elaborately reaffirmed in Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 Sup. Ct. 468, affirming a notable opinion in 117 N. Y. 1, 22 N. E. 670. For further discussion see § 141, *infra*.

[2] Youghiogheny & Ohio Coal Co. v. Erie Ry. et al., 24 Oh. Cir. Ct. 289 (1902).

constructed upon railway property under a special contract with restrictive conditions. It was held that it was in itself a public service. As a necessary consequence a grant to one shipper of coal of the exclusive use of the conveyor was held illegal as an unlawful discrimination. Judge Hall had this to say about the conveyor: "It was the means designed by both parties to be open to all shippers of that class of freight without discrimination; and it seems clear that while this arrangement remained in force, the whole plant, the tracks, the trestles and foundation which the railroad was bound to furnish, and the machine to be used and operated by the transfer company under the restrictions and conditions named in said contract were intended to be and were in fact devoted to a public use." [1]

**§ 99. Cotton presses.**

It would seem that the case of the cotton press would be quite analogous to the case of the grain elevator; for the service is almost as closely connected with transportation, and is dependent for successful operation upon the proper location to almost the same extent. However, the conservative attitude in dealing with this service apparently still prevails. Some twenty-five years ago in Ladd v. Cotton Press Company,[2] it was held that the proprietors of a cotton press could discriminate in their charges between their patrons if they pleased. The court which decided this, however, recognized that it was dealing with a doubtful case, near to the line separating public employment from private business. But in the absence of legislation making it such, this court would not hold it to be a case of public calling. This conservative attitude

[1] Compare Commonwealth v. Corey & Co., 2 Pittsburg, 444 (1863), denying the public the right to use a conveyor not put at their disposal by its owners.

[2] 53 Tex. 172 (1880).

toward this whole problem is well presented in the opinion of Mr. Chief Justice Moore: "The business of warehousing and compressing cotton is free to every one who wishes to engage in it. No grant or franchise need be obtained from the State to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public. Nor is it claimed to have been made so by statute. And we know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature if not restrained from doing so by the constitution before the demand for such an use could be enforced by the courts."

**§ 100. Stock yards.**

That the public stock yards are to be classed as public services must now be regarded as settled. In the most recent case [1] the modern argument is put in most excellent form. In holding the Wichita Union Stock Yards Company subject to State regulation as a public service, Chief Justice Johnson emphasized the fact that a business may often be affected with a public interest although it has no special franchises; for, as he points out, where monopolistic conditions prevail, public necessity usually justifies State control. And in the case of stock yards this monopoly is largely due to position. "Because of the nature of the business and the railroad facilities, the establishment of other markets at or near Wichita is

[1] Ratcliff v. Wichita Union Stockyards Co., 74 Kans. 1, 86 Pac. 150, 6 L. R. A. (N. S.) 834, 118 Am. St. Rep. 298 (1906).

impracticable, and hence these stock yards are, and of necessity will be, the only available place where the breeders, feeders and dealers of a great scope of country can conveniently market their live stock. The company has therefore a practical monopoly of a vast business affecting thousands of people who are almost obliged to deal at that market and at the rates which the company may choose to charge." [1]

**§ 101. Freight sheds.**

For ordinary freight not requiring special facilities for its handling, the railroad almost always maintains sufficient terminals. However, there are cases where the provision of freight terminals has been undertaken by outside parties. Such freight houses like other warehouses [2] would seem to be public or private in character according to whether their proprietors undertake a general service for all consignees or confine the use of their facilities to themselves and persons allied with them. Of this latter sort is the case usually cited to show that this business is not so public as to justify the grant of eminent domain to it.[3]

**§ 102. Docks.**

It has been established from the earliest times that docks are at least public in character. Vessels calling at a port are forced to use the docks that are maintained there. And there will necessarily be few such docks since

[1] In Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. 30 (1901), the United State Supreme Court held that stock yards were doing a work in which the public had a modified interest, and must therefore be considered as subject to legislative regulation. In Delaware, L. & W. Ry. Co. v. Central Stockyards Co., 46 N. J. Eq. 280, 19 Atl. 185 (1889), it was intimated that a court would not of its own motion feel justified in holding the stock yards in public service.

[2] See § 145, *infra*.

[3] See Memphis Freight Co. v. Mayor, 4 Cold. 419 (1867).

the locations which are both upon deep water and near the commercial centers will always be limited. All th necessarily calls for the law requiring public service fro those proprietors who have given it out that their doc are public. A modern instance of this is Barrington Commercial Dock Company.[1] In that case Mr. Justi Gordon founded his opinion that this dock was public up certain fundamental propositions: "When wharves belon ing to individuals are legally thrown open to the use of t public, they become affected with a public interest. W think that in determining the character of the appellan wharf, regard should be had to the use to which it h been devoted rather than its private ownership, and th upon the facts found the position of the appellant cann be maintained. As well might the proprietor of a sta coach claim the right to discriminate upon the ground th the property employed in his business was private pro erty. The doctrine, if maintained, would tend to promo and further monopolies which it is not the policy of our la to favor." [2]

[1] 15 Wash. 170, 45 Pac. 748, 33 L. R. A. 116 (1896).

[2] Of the various cases showing that the business of the wharfinger is public in character the following are selected because of the fullness of their reasoning:

*United States.*—See Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 S. Ct. 732 (1882).

*District of Columbia.*—District of Columbia v. Johnson, 1 Mackey, 51 (1881).

*Florida.*—Indian River Stb. Co. v. East Coast Transportation Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

*Georgia.*—Macon, D. & S. R. R. v. Graham & Ward, 117 Ga. 555, S. E. 1000 (1903).

*Louisiana.*—Aiken v. Eager, La. Ann. 567 (1883).

*New York.*—Buffalo v. Delawa L. & W. Ry., 39 N. Y. Supp. (1895).

*Pennsylvania.*—Rogers v. St phel, 32 Pa. St. 111, 72 Am. D 111 (1858).

The cases which decide that wharf is not public unless the pr prietors have in some way und taken to permit the public in ge eral to utilize their facilities are n inconsistent with the cases ju cited. See:

*United States.*—Louisville & R. R. Co. v. West Coast Na

**§ 103. Basins.**

As to artificial basins the case would seem still clearer. These will be few since they are constructed at great cost; and in ports where tidal conditions require them the proprietors have shipmasters at their mercy. Every element in the situation conspires to make it a case of virtual monopoly which must be under State control. Indeed these basins are usually constructed by the public authorities and opened to all at reasonable rates. What is said here again applies only to those proprietors who have opened their basins to many ships and are now refusing particular ones; for it is admitted that even in a business which is public in character, the obligation to serve the public rests only upon those who have professed to serve the public. Thus a New York decision [1] is to be supported which holds that a basin to be used principally by its owners in their private business is not a public service; and that they consequently cannot properly exercise the right of eminent domain.

**§ 104. Dry docks.**

As there is practically no authority as to the nature of dry docks, it is impossible to say with any confidence whether they are public or private in character.[2] Those constructed by governments very commonly are open under various regulations for commercial use, and are conducted as public services therefore to a considerable extent. As to those docks maintained by private owners,

Stores Co., 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. 745 (1905); Weems Stb. Co. v. People's Stb. Co., 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. 661 (1909).

*New York.*—Alexandria Bay Stb. Co. v. New York C. & H. R. R. R. Co., 18 N. Y. App. Div. 527, 45 N. Y. Supp. 1091 (1897); Thousand Island S. S. Co. v. Visger, 86 N. Y. App. Div. 129, 83 N. Y. Supp. 325 (1903).

[1] Matter of Eureka Basin, 96 N. Y. 42 (1884).

[2] In the Vidal Sala, 12 Fed. 207, the conduct of a dry dock is explained (1882).

these are not generally opened to the public indiscrim nately, but are used in connection with the private bus ness of the proprietors. These may only be used b special arrangement by owners in general who wish t do their own work with their own force upon the vesse when the dock is dry; in such cases there is lacking th element of public profession. However, when the us of a dry dock may be had in regular course by those wh apply, it should be decided that it is a public service There is an obvious necessity for an accessible locatio upon deep water within city limits where the work ma be done with the greatest facility. The need of the ship owner is usually so pressing that he cannot make terms Usually the cost of such docks is so great that even a ver large port can support but few while very often there wil be but one. All these factors in the situation give to th established dock that virtual monopoly which is charac teristic of public employment. Although the dry doc has been used as the illustration what has been sai would be equally true of other costly mechanisms fo performing much the same service, such as marine rail ways.[1]

### *Topic C. Limitation of Time*

**§ 105. Instant need creates monopoly.**

Another obvious restriction upon effective competitio results from limitation of time. When the need of th applicant is immediate the person from whom he ask service has the upper hand. This monopoly may onl be temporary; but it is none the less real. This insisten need for present service largely explains why the inn keeper dealing with the wayfarer and the carrier bargain ing with the shipper have always been held subject t

[1] As to a floating dry dock, see Walsh v. New York Floating Dr Dock Co., 77 N. Y. 448 (1879).

special law governing their dealings. It is the instant need also which gives to those agencies established for the rapid transmission of intelligence the virtual monopoly which the telegraph and telephone obviously have. Here again this classification of the authorities cannot as yet be safely taken as a generalization as two recent cases will show. In one of these a physician [1] was held not liable for refusing service to a patient in a desperate condition; in the other an undertaker was held not bound to take charge of a corpse.[2] In both cases the need was urgent, and in the nature of things must always be. But perhaps in the community at present there are enough of such men always at hand to preclude the probability of injury by delay in the average case. Or perhaps the modern law balks at requiring personal service.

**§ 106. Innkeepers.**

Innkeeping as has already been shown, has been regarded as a public calling from the earliest times. The same law continues to the present day, even when hotels are many; for it is still the truth that competition cannot be relied upon for the protection of the traveler. The need of the weary wayfarer will always be so immediate that did the law not interfere in his favor, he would pay often an exorbitant price rather than be turned back into the night to seek other accommodations. He has no time to choose, no opportunity to bargain. The innkeeper would almost invariably have the upper hand, the traveler for the moment be at the chance of his caprice, prejudice, hatred, or greed, did not the law interpose itself. But the law has interfered from time immemorial.[3] The

[1] Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058, 83 Am. St. Rep. 198 (1901).

[2] Brewster v. Miller's Sons Co., 101 Ky. 368, 41 S. W. 301, 38 L. R. A. 505 (1897).

[3] Lane v. Cotton, 12 Mod. 472 (1701), and see cases cited in § 12, *supra*.

public house where food is dispensed and lodging is pro vided has always been beyond dispute one of the publi services.[1]

## § 107. Hackmen.

The hackmen who ply for hire have always been re garded as in the employment of the public. Theirs i really one of the most striking cases of temporary monop oly. In the case of any hackman his rival may be aroun the corner prepared to make a fair price; and yet as th traveler cannot bide his time he will often submit to a extortionate price rather than let a moment pass. Fo the time being the monopoly is effective; and, therefore the necessity of regulating the business of hackmen upo the principles of public service law has long been appar ent. At times hackmen who are hampered by the en forcement of such regulations complain that they ar unreasonable. In Fonsler v. Atlantic City,[2] for instance it was contended that the ordinance of the city that re-

[1] The following cases bring out the many factors which have caused the innkeeper to be held at the service of the public in all ages:

*California.*—Willis v. McMahan, 89 Cal. 156, 26 Pac. 649 (1891).

*Kentucky.*—Kesten v. Hildebrand, 9 B. Mon. 72, 48 Am. Dec. 416 (1848).

*Maine.*—Atwater v. Sawyer, 76 Me. 539, 49 Am. Rep. 634 (1884).

*New Hampshire.*—Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837).

*New York.*—Adams v. Freeman, 12 Johns. 408, 7 Am. Dec. 327 (1815).

*North Carolina.*—State v. Steele, 106 N. C. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. Rep. 57 (1890).

*Pennsylvania.*—Com. v. Mitchell, 2 Parsons, 431, 1 Phila. 63 (1850).

*Tennessee.*—Dickerson v. Rogers, 4 Humph. 179, 40 Am. Dec. 64 (1843).

*Vermont.*—State v. Stone, 6 Vt. 295 (1834).

*England.*—Thompson v. Lacy, 3 B. & Ald. 283 (1820); Rex v. Ivens, 7 Car. & P. 213 (1835); Hawthorn v. Hammond, 1 Car. & K. 404 (1844); Rex v. Collins, Palmer, 367, 373, 2 Rolle, 345 (1623); Rex v. Smith, 65 J. P. 521 (1901); Lamond v. Richard, 1 Q. B. 541 (1897).

[2] 70 N. J. L. 125, 56 Atl. 119 (1903).

quired every hackman to take anyone who applied at the established rates unless the sign "engaged" was displayed in good faith was unjustifiable. But Mr. Justice Garretson said, upon certiorari to dispose of a conviction under this ordinance: "We are unable to see that any of the regulations imposed by this ordinance are unreasonable. There is nothing unreasonable in requiring the driver of an omnibus, permitted by the city's license to run his vehicle on the public street, to carry all persons applying to him for passage and legally tendering the fare, as common carriers are required to do." [1]

**§ 108. Messenger service.**

It is a disputed question whether the city companies which furnish messenger boys on call are engaged in common carriage, but the cases seem to show that they are at least engaged in public employment. The need of those who employ messengers is generally immediate and the established company has usually virtual monopoly. This business of furnishing boys is publicly solicited by them; and the company have a regular basis for installing call boxes in congested districts. All that can be said with certainty as to the profession of such companies is that they undertake to provide their public with messengers. It seems to be the better opinion that this reg-

[1] That hackmen are at the service of the public is generally recognized, see:

*Iowa.*—Bonce v. Dubuque St. Ry. Co., 53 Iowa, 278 (1880), 5 N. W. 177, 36 Am. Rep. 221 (1880).

*New York.*—Brown v. New York Central & H. R. R. R. Co., 75 Hun, 355 (1894), 27 N. Y. Supp. 69.

On the other hand, liverymen who make no pretense of serving the public can bargain as they please. See:

*Iowa.*—Burlington v. Unterkircher, 99 Iowa, 401, 68 N. W. 795 (1896).

*Massachusetts.*—Copeland v. Draper, 157 Mass. 558, 32 N. E. 944 (1893).

*Missouri.*—Trout v. Watkins L. & V. Co. (Mo. App.) 130 S. W. 136 (1910).

*New Jersey.*—Atlantic City v. Dehn, 69 N. J. L. 233, 54 Atl. 220 (1903).

ular service is not common carriage.[1] But it is not altogether impossible that in particular instances messenger companies might specially undertake as common carriers.[2]

**§ 109. Call boxes.**

In connection with messenger service it is common for the corporation conducting the business to install call boxes upon the premises of their patrons. If this is done as a special favor for particular patrons it would be difficult to show that this is a part of the regular service professed. But if it is generally done for all customers in the same classification, the company could not refuse to install these boxes for an applicant of the same sort unless it had some personal defense. One other possible case of this class is that of the alarm service which for many years now has been maintained in large cities. The need of this protection by those engaged in certain lines of business is obvious. Moreover, the companies who install the call boxes must ask special privileges from the community to install its wiring system.[3] It would seem, therefore, that this service came within cases as to messenger call just discussed.

*Topic D. Difficulty of Distribution*

**§ 110. Inherent limitations upon competition.**

Another natural limitation upon competition results from the character of the product. If the physical char-

[1] *District of Columbia.*—White v. Postal Telegraph Co., 25 App. D. C. 364 (1905).

*Massachusetts.*—Haskell v. Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324 (1906).

*New York.*—Hirsch v. Am. Dist. Telegraph Co., 98 N. Y. Supp. 371, 112 N. Y. App. Div. 265 (1906).

[2] *Maryland.*—American Dist. Tel. Co. v. Walker, 72 Md. 454, 20 Atl. 1, 20 Am. St. Rep. 479 (1890).

*New York.*—See Sandford v. Am. Dist. Tel. Co., 13 Misc. 88, 34 N. Y. Supp. 144 (1895), and Gilman v. Postal Telegraph Co., 48 Misc. 372, 95 N. Y. Supp. 564 (1905).

[3] Holmes v. Union Telegraph & T. Co., 16 N. Y. Supp. 563 (1891).

acteristics of the product are such that it can only have a local distribution the barrier against outside competition may fairly be said to be natural. Thus those who supply water through pipes are in public employment, while those who bottle water are not. And what after all is that element in the situation which makes the sale of gas a public employment while the vending of candles is a private business? Is it not this—that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in every market, while a thousand cubic feet of gas can only be got from the pipes of the local company, which gives it control of the situation. When the market is thus limited by the nature of the product it may fairly be said that the monopoly of the local company is natural.

### § 111. Gas works.

When the first works were constructed to furnish gas through mains laid in the public streets to various householders in the community at large, new conditions in the supply of illumination were created. In the first cases, as has been noted, the change in the conditions of supply whereby the local company had gained a virtual monopoly was not appreciated, and it was said in the earlier American cases [1] that the proprietor of a gas works was free as the owner of any factory to sell his product as it should please him best.[2] The honor of being the first to

[1] These cases still have an historical interest although they have long since become obsolete even in the jurisdictions which decided them. See § 31, *supra*, for discussion of them.

*Connecticut.*—McCune v. Norwich Gas Co., 30 Conn. 521, 79 Am. Dec. 278 (1862).

*Massachusetts.*—Com. v. Lowell Gas Light Co., 12 Allen, 75 (1866).

*New Jersey.*—Paterson Gas Light Co. v. Brady, 3 Dutch. 245, 72 Am. Dec. 360 (1858).

*New York.*—New York C. & H. R. R. v. Metropolitan Gas Light Co., 63 N. Y. 326 (1875).

[2] This evolution in England is to be traced in legislation. The earlier

point out the essential change wrought by these ne conditions belongs to Mr. Justice Smith who held : Shepard v. Milwaukee Gas Light Company,[1] that tl gas company was bound to sell its gas to every citizen ( Milwaukee upon compliance with such regulations onl as the company might rightfully impose. "Corporatio of this kind," he said, "are not like trading or manufa turing corporations whose productions may be transporte from market to market throughout the world. Its manu facture depends upon the consumption of the immediat neighborhood for its profit and success, and upon no othe place. From the nature of the article, the objects of th company, their relations to the community, and from a the considerations before mentioned, it is to me apparer that the company is not at all analogous to an ordinar manufacturing or trading corporation." [2]

gas companies act provided simply that these companies might make such arrangments as they pleased for the sale of gas to consumers. It was not until comparatively recently that the gas legislation was expanded to provide that these companies must serve all who made proper application.

[1] 6 Wis. 539, 70 Am. Dec. 479 (1858).

[2] From the great number of modern decisions which hold gas companies subject to the obligation of the public service law, the following are selected in which the general principle is well discussed:

*United States.*—Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. 553 (1889).

*Illinois.*—People's Gas Light & C. Co. v. Hale, 94 Ill. App. 406 (1900).

*Indiana.*—Portland Gas Co. v. State ex rel. Keen, 135 Ind. 54, 3 N. E. 818, 21 L. R. A. 639 (1893

*Kansas.*—In re Pryor, 55 Kan 724, 41 Pac. 958, 29 L. R. A. 398, 4 Am. St. Rep. 280 (1895).

*Kentucky.*—Owensboro Gas Ligh Co. v. Hildebrand, 19 Ky. L. R 983, 42 S. W. 351 (1897).

*Louisiana.*—New Orleans Ga Light Co. v. Paulding, 12 Rob. 37 (1845).

*Maine.*—Brunswick Gas Ligh Co. v. United Gas, etc., Co., 85 Me 532, 27 Atl. 525, 35 Am. St. Rep 385 (1893).

*Maryland.*—Gas Light Co. v Baltimore v. Colliday, 25 Md. (1866).

*Massachusetts.*—Opinion of Jus tices, 150 Mass. 592, 24 N. E. 108 (1890).

*Michigan.*—Williams v. Mut. Ga Co., 52 Mich. 499, 18 N. W. 23 50 Am. Rep. 266 (1884).

**§ 112. Fuel gas.**

The same principles apply to the supply of gas for fuel. The only practical question seems to be whether the gas company has generally undertaken the supply of gas for fuel; it being apparently universally held that such supply is public in character. In a recent case [1] where the public character of this supply was questioned, the Supreme Court of West Virginia in an elaborate opinion pointed out the fundamental causes which make this service a public one, Judge Poffenbarger saying: "Heating being an agent or principle indispensable to the health, comfort and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens, as to furnish water. It is inquired, why do not municipalities also purchase coal mines and issue their bonds therefor, and embark in the business of mining and selling coal to private consumers? An obvious reply is that coal and other fuel may be carried to the consumer by the ordinary channels of transportation, at a comparatively moderate expense, while in conveying natural gas, streets must be opened, pipes laid, works erected, fixtures and machinery purchased, and other expenses incurred, beyond the enterprise and capital of an individual." [2]

*Missouri.*—Vanderberg v. Kansas City Gas Co., 126 Mo. App. 600, 105 S. W. 17 (1907).

*New Jersey.*—Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482 (1904).

*Ohio.*—Zanesville v. Gas Light Co., 47 Ohio St. 1, 23 N. E. 55 (1889).

*Oregon.*—Mackin v. Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 62 Pac. 20, 49 L. R. A. 596 (1900).

*Wisconsin.*—Madison v. Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. Rep. 944 (1906).

[1] Charleston Natural Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410 (1901).

[2] In the following cases also the supply of gas for fuel is treated as public in character.

*California.*—People ex rel. v. Los

**§ 113. Electric plants.**

In the present generation a new method of illumination by electricity was devised which involved distribution from a central plant by a system of wires radiating through the localities served—a very expensive plant to install. The essential features of the electric business were so like the main conditions in the gas business with its generating plant and pipe system that it was obvious from the outset that the same law of public service was to be enforced in this instance. Indeed, it is striking that in no adjudicated case has an electric light company ever squarely denied that there rested upon it the primary obligation to serve all. All this is most significant; for it shows that the law of public service has now such general acceptation that in any new instance similar in character it will be applied by the courts without hesitation. One of the latest cases as to electric lighting is Snell v. Clinton Electric Light Company,[1] where the company refused to furnish electric light to an applicant upon the same terms as to others. In his holding for this applicant Mr. Justice Carter stated the fundamental propositions involved in this way: "There is no statute regulating the manner under which electric light companies shall do business in this State. They are therefore subject only to the common law, and such regulations as may be im-

Angeles Independent Gas Co., 150 Cal. 557, 89 Pac. 108 (1907).

*Illinois.*—People's Gas Light & Coke Co. v. Hale, 94 Ill. App. 406 (1900).

*Indiana.*—Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321 (1892).

*Kentucky.*—Nairin v. Kentucky Heating Co., 27 Ky. L. R. 551, 86 S. W. 676 (1900).

*Louisiana.*—State v. New Orleans Gas Co., 108 La. 67, 32 So. 179 (1902).

*Ohio.*—Toledo v. North Western Ohio Natural Gas Co., 6 Oh. N. P. 531 (1898).

*Pennsylvania.*—Hoehle v. Allegheny Heating Co., 5 Pa. Sup. Ct. 21 (1897).

[1] Snell v. Clinton Electric Light Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284 (1902).

posed by the municipality which grants them privileges. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. Both reason and authority deny to a corporation clothed with such rights and powers and bearing such a relation to the public the power to arbitrarily fix the price at which it will furnish light to those who desire to use it. The company was bound to serve all its patrons alike; it could impose on the plaintiff in error no greater charge than it exacted of others." [1]

[1] In the following cases the recognized public obligations of electric companies are discussed:

*United States.*—Capital City Light & Fuel Co. v. Tallahasse, 186 U. S. 401, 46 L. ed. 1219, 22 Sup. Ct. 866 (1902).

*Florida.*—Jacksonville Electric Light Co. v. Jacksonville, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 51 Am. St. Rep. 24 (1895).

*Georgia.*—Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122 (1906).

*Indiana.*—Beck v. Indianapolis Light & P. Co., 36 Ind. App. 600, 76 N. E. 312 (1905).

*Kentucky.*—Owensboro Gas Light Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351 (1897).

*Louisiana.*—Strohmeyer v. Consumers' Electric Co., 111 La. 506, 35 So. 723 (1904).

*Maine.*—Edison U. M. Co. v. Farmington Electric L. & P. Co., 82 Me. 464, 19 Atl. 859 (1890).

*Massachusetts.*—Weld v. Gas & Electric Light Consumers, 197 Mass. 556, 84 N. E. 101 (1908).

*Minnesota.*—Minnesota Co. & Power Co. v. Koochiching, 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638 (1906), *semble.*

*Missouri.*—State ex rel. v. Allen, 178 Mo. 555, 77 S. W. 868 (1903).

*New Hampshire.*—American L. & T. Co. v. General Electric Co., 71 N. H. 192, 51 Atl. 660 (1901).

*New York.*—Armour Packing Co. v. Edison El. Co., 115 N. Y. App. Div. 51, 100 N. Y. Supp. 605 (1906).

*Ohio.*—Cincinnati R. R. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422 (1897).

*Pennsylvania.*—Mercur v. Media Electric Light Co., 19 Pa. Sup. Ct. 519 (1902).

*Vermont.*—Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818 (1903), *semble.*

*Virginia.*—Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855 (1903), *semble.*

*Wisconsin.*—Madison v. Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529, 116 Am. St. Rep. 944 (1906).

**§ 114. Electric power.**

The supply of electric energy for power purposes, however, has not yet been universally recognized as a public service, although it seems that there can be no real doubt as to the final outcome. It may be admitted that those cases which hold that electric power development is not a public employment when its proprietors do not undertake to serve the public indiscriminately are correct.[1] Distinguishing these cases thus, the cases which deny that the supply of electricity for power is public in character are in a distinct minority.[2] Even in these jurisdictions the general supply of electricity for illumination is held to be a public employment as a matter of course. And where the company in question is supplying electricity for both illumination and power the whole enterprise is considered of a public nature. It is indeed difficult to find any really essential differences between the supply of electricity for power and its sale for illumination. Where, therefore, there is openly made a sufficient profession of public service, the supply of electricity for power would seem to be as plain a case of public employment as the supply of electricity for illumination; and so the majority of the cases dealing with the problem now hold.[3] The actual point upon which the cases are di-

[1] *Vermont.*—Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818 (1902).

*Virginia.*—Fallsburg Power & Mfg. Co. v. Alexander, 101 Va. 98, 43 S. W. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855 (1903).

[2] *Maine.*—Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472 (1905).

*Washington.*—State ex rel. v. Superior Court, 42 Wash. 660, 85 Pac. 666, and cases cited (1906).

[3] *United States.*—Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660 (1908).

*Georgia.*—Jones v. No. Georgia Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122 (1906).

*Idaho.*—Hollister v. State, 9 Ida. 8, 71 Pac. 541 (1903).

*Indiana.*—Stoy v. Indiana Hydraulic Power Co., 166 Ind. 316, 76 N. E. 1057 (1906).

vided just at present is whether eminent domain is justified for such a purpose; but this really involves the character of the business. It is readily seen as is said in several of these cases that one of the essential and constituent obligations upon the part of the individual who attempts to exercise the power of eminent domain under these acts is that he shall serve all of the public fairly and without discrimination. Without such obligation of public service the legislation granting eminent domain would be unconstitutional.[1]

**§ 115. Steam heat.**

As matters now stand all but an infinitesimal per cent of steam heating is done by private plants, almost always by the owner of the heated premises. There are some instances where steam is sold for heating purposes from near-by boilers, but as this is by special contract, without any holding out to serve the public in general, even this is not an instance of public business. There remain the

*Minnesota.*—Minnesota C. & Power Co. v. Koochching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638 (1906).

*Montana.*—Helena Power Transmission Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567 (1907).

*New Hampshire.* — Rockingham County L., H. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581 (1904).

*New York.*—Re East Canada Creek Electric Light & Power Co., 49 N. Y. Misc. 565, 99 N. Y. Supp. 109 (1905).

*Oregon.*—Grande Ronde El. Co. v. Drake, 46 Oreg. 243, 78 Pac. 1031 (1905).

*South Carolina.*—McKeekin v. Central Carolina Power Co., 80 S. C. 512, 61 S. E. 1020 (1908).

*Utah.*—Salt Lake City v. Salt Lake City W. & E. Power Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648 (1902), *semble.*

[1] This is seen to be the issue in the cases on both sides of this question. See particularly:

*Georgia.*—Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122 (1906), the court being convinced of this public obligation.

*Maine.*—Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472 (1905), the court believing that there was no public service involved.

cases (as yet very few for with present methods the los in transmission is too large) of companies organized t supply steam through pipes placed in the public street with the design of selling it to abutting owners. The ver fact that they ask the use of the streets for this purpos is announcement enough of their public profession pro vided that the business is public in character by reaso of the nature of the service. But although the com pany need not fear outside competition,[1] the consume at present can perhaps better supply himself.

## § 116. Refrigeration.

Almost exactly the same argument may be repeated i regard to the modern method of supplying refrigeratio by ice machines driving refrigerating fluids through pipes. Most of these plants are wholly devoted to the privat business of their owners, with some considerable amoun of incidental private sale.[2] However, there are cases o refrigeration plants in market districts with their pipe laid through the streets. It would seem that with the profession thus established, the business becomes public. It seems public in character because again the nature of the service makes outside competition practically im possible. And the small dealer who finds his rivals served by such a company while he is himself refused may not improbably have a remedy at law.

## § 117. Public need creates public interest.

The most prominent thing in this chapter is perhaps

[1] Just what the status of these companies is, it is difficult to affirm. The only case dealing in any way with the matter seems to be Evans v. Boston Heating Co., 157 Mass. 37, 31 N. E. 698 (1892), which really leaves their position undetermined.

[2] In Matter of Rhinehart, 93 N. Y. App. Div. 410, 87 N. Y. Supp. 789 (1904), it was held indispensable to the legality of the use of streets for refrigeration pipes that the proprietor of the service should have assumed the obligation to serve all applicants in their district.

the attention paid to the public need in determining whether a business is so public in character that those who undertake it must serve the public in accordance with their profession. Where there are natural restrictions particularly it behooves the State to see to it that those who are exploiting them upon a public basis should live up to their public profession, so that each member of the public may have his needs supplied in accordance with his requirements, so far as may be, at a reasonable price. This extraordinary activity of the law in behalf of the individual is, however, confined to necessary services. The law has little concern with the monopolization of unessential things. It subjects a "scenic railway" at an amusement park to no exceptional liabilities.[1] It leaves a circular railway built primarily to view the Niagara Gorge [2] outside the pale of State aid. And it leaves skating rinks [3] and theaters [4] to deal as they please with their public, and exclude whomsoever they choose.

[1] In Meisner v. Detroit, B. I. & W. Ferry Co., 154 Mich. 545, 118 N. W. 14 (1908), it was said in passing that theaters, circuses, race tracks, private parks, and the like are, in the absence of statutes regulating the business, private enterprises, under the control of private persons, who may license the persons they will admit, and refuse admission to others, and the right given to enter such places is a mere license which may be revoked.

[2] Matter of Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429 (1888).

[3] Tombler v. Kœlling, 60 Ark. 62, 28 S. W. 795, 27 L. R. A. 502, 46 Am. St. Rep. 146 (1894).

[4] Purcell v. Daly, 19 Abb. N. C. 301 (1886).

## CHAPTER IV

### VIRTUAL MONOPOLY

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**§ 120. Economic limitations create public employment.**

The common fact in all the instances of public employment which have been discussed thus far is virtual monopoly. It matters not by what conditions this situation is established. The conditions which may produce virtual monopoly are various; and some of them will suffice alone. The effect of various natural limitations, such as available sources of supply, restricted opportunities of access, limited time at disposal and difficulties in distribution have just been discussed. But of almost equal importance are other factors producing true economic monopoly by deterring effectual competition, such as the cost of the plant, the large scale upon which the business is done, the absence of effectual substitutes and the dependent position of the particular service. These elements in the general situation have doubtless already been taken into account unconsciously, but they are of such importance that they deserve full discussion. With all the factors which may produce virtual monopoly in mind it will be evident enough that in this general situation however established there is real danger to society calling for regulation by the State.

*Topic A. Cost of the Plant*

**§ 121. Financial limitations upon potential competition.**

One usual characteristic of a public employment is the relatively large cost of the plant. In very many instances this runs high into millions which must be invested before

the service can be begun. This necessity of getti together so much capital limits fundamentally the amou of such construction. Canals and railroads furnish t chief examples of this. It would take perhaps twen billion dollars to duplicate the present facilities for trar portation; and it is, therefore, practically inconceivat that it will be done. Moreover, in most public servic there is still another reason why capital is kept fro investment in a competing service. As has been se these are mostly local services and the capital invest must be sunk at the risk of failure in this one marke For example, an investment made in a gas works or a electric plant cannot be withdrawn; nor can the product l sold elsewhere. Thus to the enormous cost as a deterre to competition is added the imminent risk of total loss a desperate competition in which one must perish.

## § 122. Canals.

It is obvious that the great cost of a canal system compared with the infinitesimal use which the individu boatman makes of the system puts the user entirely at t mercy of the company operating the existing canal. Th is indeed characteristic of all highway use to which can maintenance is most closely allied. As was said in leading case [1] of a Wisconsin canal, "The canal of t defendant is a public highway, which all persons upo complying with all lawful requirements may navigate an use at their pleasure."[2]

[1] McArthur v. Green Bay & M. Canal Co., 34 Wis. 139 (1874).

[2] That canals are subject to the law governing public service is shown by the following cases among others:

*United States.*—United States v. Ormsbee, 74 Fed. 207 (1896).

*Georgia.*—Savannah & O. Canal Co. v. Shuman, 91 Ga. 400, 17 S. 937, 44 Am. St. Rep. 43 (1893).

*Louisiana.*—Sheldon v. New O leans Canal Co., 9 Rob. (La.) 3( (1844).

*New Jersey.*—Stewart v. Lehig Valley R. R., 38 N. J. Law, 5( (1875).

*New York.*—Pennsylvania Co

**§ 123. Channels.**

What has been said of canals is even more true of channels. Necessary as these are for access to ports, the demands of the community so usually anticipate commercial practicability that the government is usually called upon to dredge them; and when completed the merchants are unwilling that their commerce should be hampered by the imposition of any considerable dues for their use. Hence it is unusual to find these channels constructed by private corporations. But whenever they are so constructed there can be no doubt that the public must be given passage upon reasonable terms. This was squarely decided in Buffalo Bayou Ship Channel v. Milby & Dow,[1] where it was held that the channel company could not turn back a vessel upon the ground that the tugboat towing her owed tolls, Mr. Justice Walker saying: "This water channel or cut, owned and controlled by the defendant under its charter from the State was a public highway for vessels beyond question; and as such the owners of all vessels had a right to regard and to treat it, using it at their pleasure, subject to the lawful conditions imposed upon them therefor. A toll bridge, built in pursuance of an act of the legislature, is a public highway; manifestly, this ship channel was so too."[2]

**§ 124. Railroads.**

The common example of the cost of construction as the deterrent influence is the railway system. The fact must, however, be reckoned with that, notwithstanding this great

Co. v. Delaware & Hudson Canal Co., 31 N. Y. 91 (1865).

*Pennsylvania.*—Commonwealth v. Delaware Canal Co., 43 Pa. St. 295 (1862).

*England.*—Case v. Midland Ry. Co., 27 Beav. 247 (1859).

[1] 63 Tex. 492, 51 Am. Rep. 668 (1885).

[2] See Manistee River Improvement Co. v. Lamport, 49 Mich. 442, 13 N. W. 810 (1882).

first cost, the construction of competing railroad systems has in the past been not uncommon. But experience has proved the folly of such investments. The potential capacity of an existing railroad is but seldom reached, so that the new railroad must fight for a traffic essential to both of them. There follows a death struggle, as the history of rate wars shows. The result of all this is that to-day even if the bodies granting franchises generally believed still that such duplication of plant was wise under such circumstances, the first cost accompanied by the recognized risk would largely prevent competition by parallel lines in most instances. The established railroad along its own route has therefore a virtual monopoly not sufficiently restrained even by potential competition. In this situation regulation by law is inevitable. Since the "Granger Cases"[1] at all events it has been accepted law that, without any of those charter provisions with which the public was wont in earlier days to safeguard itself in granting franchises, the railroads are so affected by the public interest that they are subject to exacting regulation of their service.[2]

**§ 125. Railway terminals.**

In many of the larger cities there are union stations owned by separate terminal corporations which are used in common by several railway companies which enter the city. These stations and their yards are constructed at great expense upon advantageous sites, almost always with

[1] Peik v. Chicago N. W. Ry., 94 U. S. 164, 24 L. ed. 97 (1876); Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94 (1876); Chicago, M. & St. P. R. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99 (1876); Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 S. Ct. 334, 348, 349, 388, 391, 1191 (1886).

[2] It is needless to collect at this point the innumerable decisions since that time which have held the railway systems subject to public regulation, as this forms in large part the subject-matter of this book.

the aid of eminent domain and very often with other special privileges. Naturally enough the question has already been raised whether these terminal corporations can refuse to admit other railroads which later apply for terminal facilities. There are already a few cases in which that issue has been squarely involved, State v. Jacksonville Terminal Company [1] being perhaps the most prominent. In that case a mandamus was granted to enforce an order of the railroad commissioners of Florida directing the terminal company to permit the use of the station by the applicant railway at a reasonable compensation to be fixed by the commission. The court decided that the commission had constitutional power to issue this order, Mr. Justice Carter saying of the position of such a terminal company: "By undertaking to permit the use of this property by, and to furnish facilities for, one or more railroad common carriers it dedicates it to a use that is essentially public; and, to the extent that the public has an interest in that use, it must submit to be controlled by the public for the common good. The legislature may, therefore, for the common good, require it to admit all railroad common carriers, to the extent of its capacity, which the public interest may demand, and to limit the charges for the uses and privileges of its terminal to reasonable compensation." [2]

[1] 41 Fla. 363, 377, 27 So. 221, 225 (1899).

See also Union Ry. of Balt. v. Canton R. R. Co., 105 Md. 12, 65 Atl. 409 (1907).

[2] In the following cases the public character of railway terminals was recognized:

*Illinois.*—Terre Haute & I. R. R. Co. v. Peoria & P. Ry. Co., 182 Ill. 501, 55 N. E. 377 (1899) *semble.*

*Massachusetts.*—Sears v. Street Commrs., 180 Mass. 274, 62 N. E. 397, 62 L. R. A. 144 (1902).

*Michigan.*—Fort Street Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. 228 (1890).

*Missouri.*—Kansas City & N. C. R. R. Co. v. Baker, 183 Mo. 312, 82 S. W. 85 (1904).

*New Hampshire.*—Concord & M. R. R. Co. v. Boston & M. R. R. Co., 67 N. H. 464, 41 Atl. 263 (1893).

**§ 126. Railway bridges.**

Railway bridges are sometimes constructed by independent companies with the design of selling running rights to various railways. Usually in the charters of such bridge compánies it is expressly provided that they shall grant the trains of all railways that make proper application running rights over the bridge upon the payment of reasonable tolls. But whenever a bridge company gains legal privileges by the acceptance of such a charter as it generally does, it should be clear whether its charter is mandatory or permissive that the bridge is put at the service of railways in general. . As the United States Supreme Court [1] recently said of a bridge company whose charter was explicit (after remarking that there was no question in the particular case of the reasonableness of the compensation tendered by the railway applying, or the capacity of the bridge for the service asked). "The construction of the bridge, doing away as it did with the delay and annoyance of transportation across the river by ferry, added largely not merely to the value of the entire property, but also to the great convenience of the traveling and shipping public. The Act giving authority for a large issue of bonds thereby insuring the immediate construction of the bridge was accompanied by a proviso that upon reasonable compensation the use of the bridge should be accorded to other companies. Availing itself of the privileges conferred, the company accepted the

*Tennessee.*—Ryan v. Terminal Co., 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303 (1899).

But unless the proprietors of the union station have undertaken generally to admit all railroads to its use they cannot be compelled to do so.

*Illinois.*—Terre Haute & I. R. R. Co. v. Peoria & P. V. Ry. Co., 167 Ill. 296, 47 N. E. 513 (1897).

*Virginia.*—Commonwealth v. Norfolk & W. Ry. Co. (Va.), 68 S. E. 351 (1910).

[1] Union Pacific R. R. Co. v. Mason City & F. D. R. R. Co., 199 U. S. 160, 50 L. ed. 134, 26 Sup. Ct. 19 (1905). But see Evansville & H. Traction Co. v. Henderson Bridge, 134 Fed. 973 (1904).

amendment in its entirety and is bound by its terms as fully as though it had embodied them in a contract."[1]

**§ 127. Car ferries.**

Car ferries are obviously like railway bridges. It would not be impossible to have such a ferry operated for the transportation of the cars of various companies, and it would then undoubtedly be considered a public service. But as a practical matter the investment is so relatively small for a railroad company that it would almost always operate its own ferry and then it would not be obliged to take the cars of other companies. The character of the business of these car ferries has been the subject of some litigation. The nature of this service was fully described in one of the earlier cases [2] in language which has since been quoted with approval by the United States Supreme Court.[3] "The boat of the defendants is provided with two railroad tracks, which prevent the entrance or egress of ordinary vehicles, and also of foot passengers, except as they are transported in cars which run upon the railroad tracks. The boat is exclusively used for the transportation of railroad cars, in connection only with the arrival of trains. It is impossible to transport ordinary vehicles upon the boat, it is impracticable to transport foot passengers, except as they are conveyed to the boat in cars.

[1] In the following cases, bridges which have offered their facilities to railways in general were properly considered to be public in character:

*United States.*—Canada Southern Ry. v. International Bridge Co., 8 Fed. 190 (1881).

*Missouri.*—Southern Ill. & Mo. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301 (1902).

Although in public service such bridge companies are not common carriers.

*United States.*—Kentucky & I. Bridge Co. v. Louisville & N. Ry., 37 Fed. 567 (1889).

*Texas.*—Southern Pacific Railway Co. v. Patterson, 7 Tex. Civ. App. 451, 27 S. W. 194 (1894).

[2] Mayor v. New England Transfer Co., 14 Blatch. 159 (1887).

[3] St. Clair County v. Interstate Transfer Co., 192 U. S. 454, 48 L. ed. 518, 24 Sup. Ct. 300 (1904).

The whole arrangement of boat and docks is for the ingress and egress of railroad cars, and not for the accommodation of anything else."

**§ 128. Railway tunnels.**

The case of a railway tunnel constructed and maintained by an independent company through which the trains of various railways are hauled is more uncommon although not absolutely unknown. The situation is entirely analogous to those instances which have just been discussed,[1] and if in any way the tunnel company has assumed the obligation of serving various railways it should not be allowed upon general principles to discriminate between them. And it would then be true of such tunnels also that although in public service they would not be common carriers of the contents of the trains which pass through even if the trains are hauled by peculiar locomotives furnished by the tunnel company, since the possession of the goods or the control of passengers within the trains would not pass from the railways.[2]

**§ 129. Union railways.**

A union railway constructed to enable various railways connecting with it to run their trains (usually solely freight trains) through to various terminal points, is practically in the same position as the union station. In a recent case [3] the Union Railway of Baltimore chartered to provide running rights to the railways entering the city refused to make connections with the Canton Rail-

[1] In one of the few cases which have been found involving such tunnel companies they are treated as being subject to exactly the same law as bridge companies. St. Clair Tunnel Co. v. Powers, 138 Fed. 262 (1905).

[2] See also justifying eminent domain for tunnel companies, McEwan v. Pennsylvania, N. J. & N. Y. Ry. Co., 72 N. J. L. 419, 60 Atl. 1130 (1905).

[3] Union Railway of Baltimore v. Canton R. R. Co., 105 Md. 12, 65 Atl. 409 (1907).

road. But the court held that such service was exactly within the duties resting upon the Union Railway in accordance with its charter. And as to the validity of such charter provisions, even in the form of subsequent amendments, Mr. Justice Jones said: "The grant therein, therefore, to other corporations of the right to use its railroad was not an incongruous provision, but one similar to, and consistent with, the object of the incorporation. It can hardly be questioned that the Legislature could incorporate a railroad company for the express purpose of building a railroad for the use of other railroads in getting their freight and the articles of traffic to tide water in conditions that would make it expedient or desirable to do so. There can be no difference in principle between a railroad company incorporated solely for such use and one incorporated with that as one of its purposes."[1]

**§ 130. Belt lines.**

It is also not uncommon for the handling of traffic at large commercial centers, or at important junction points, to find a short line of railway operated by a company with a distinct charter connecting the various lines of railroad converging at this point. These are variously named: "Connecting railways," "junction railways," "belt lines," or "terminal railways," all denoting the special character of the service that is rendered. These transfer companies very commonly conduct the transportation themselves, furnishing the motive power, and

[1] In the following cases the public character of such union railways is recognized:

*United States.*—Interstate S. Y. Co. v. Union Ry. Co., 99 Fed. 472 (1900).

*Missouri.*—State ex rel. v. Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005 (1907).

*New Jersey.*—Nat. Docks Ry. Co. v. Central R. R. Co., 32 N. J. Eq. 755 (1880).

*Pennsylvania.*—Windsor Glass Co. v. Carnegie Co., 204 Pa. St. 459, 54 Atl. 329 (1903).

the train crew as well; and therein they differ from th various railways just discussed which generally undertak no more than to provide trackage or at most haulage It is plainly true of such belt lines as serve their publi indiscriminately in accordance with their profession tha they are in a public employment and subject to publi regulation. Thus in Norfolk & Portsmouth Belt Lin Railroad v. Commonwealth,[1] upon an appeal of the com pany from a judgment of the State Corporation Commis sion reducing the price for an incidental switching servic to twenty-five cents per car, the Supreme Court of Ap peals of Virginia held this switching line to be a publi service corporation and subject to the jurisdiction of th Commission. "If the power of the Commission is lim ited merely to fixing the rate for carriage, and it is with out authority so to regulate that service as to render i effective, it is obviously wholly inefficacious with respec to this large class of consignees and shippers. Upon th first assignment of error, therefore, the court is of opin ion that the service in question is cognate to and so in timately connected with the public service involved in th carriage and delivery of freight by the railroad company to patrons along its route as to constitute a part of such service, and, consequently, is subject to governmenta control." [2]

[1] 103 Va. 289, 49 S. E. 39 (1904).

[2] The following cases bring out the public nature of belt lines:

*United States.*—United States v. Sioux City Stockyards Co., 162 Fed. 556 (1908).

*Georgia.*—Dixon v. Cent. of Ga. Ry., 110 Ga. 173, 35 S. E. 369 (1900).

*Kansas.*—Larabee Flour Mills v. Missouri Pacific Ry. Co., 74 Kans. 808, 88 Pac. 72 (1906).

*Mississippi.*—Yazoo & M. V R. R. Co. v. Searles, 85 Miss. 520 37 So. 939, 68 L. R. A. 715 (1904).

*Nebraska.*—State ex rel. v. Unior Stockyards Co., 81 Neb. 67, 11 N. W. 627 (1908).

Whether this switching service i common carriage in the strict sens so as to make the transfering com pany liable as an insurer of all th property or persons within its con trol or disposition would seem to b

*Topic B. Service on a Large Scale*

**§ 131. Disadvantages of the individual.**

Another characteristic of public employment is that the applicant who wishes an individual service of the kind rendered by the established company is almost always at great disadvantage relatively in supplying himself. This is due largely to the obvious economies of operation upon a large scale. Two leading cases in the Supreme Court of the United States bring this out. A grain elevator can handle grain at a fraction of what manual transfer would cost. Again a stock yard can care for a cow at a fraction of what a shipper would have to pay for the keep of a single cow elsewhere. Were it not for the coercive law of public service it is only too probable that these economies from service on a large scale would be largely retained by the serving company and not given to the public served.

**§ 132. Signal service.**

Many examples might be put of the disadvantages to which an individual would be put if he were refused service, by reason of the much greater cost to him of making arrangements to serve himself, for this is an element in the situation creating public employment which is very generally present. But it is proposed in this topic to confine the discussion to one class of callings where this factor is peculiarly prominent in modern times. For

a question of fact. It is probable that more often than not such switching is conducted without that assumption of actual possession which is necessary to make out carriage strictly, but certainly where the connecting railway enters into the transportation scheme as a connecting carrier it must be held liable as such. On this point compare the facts and the decisions of the two following cases, both of which seem to be correct on their facts, although apparently oppositely decided: Swift & Co. v. Ronan, 103 Ill. App. 475 (1902)—common carriage not found—with Fleming v. Kansas City Suburban Belt R. Co., 89 Mo. App. 129 (1901)—common carriage held established.

the rapid intercommunication of intelligence there are widespread systems now established which it would be beyond the power of any individual to duplicate if he would; while for a small fee a message can be sent to any part of the world. These transmission systems had their beginnings about a century ago in the semaphore lines established across the country between certain important European cities. These continued to grow until they were altogether displaced by the discovery of the telegraph. There do not appear to have been any common-law decisions as to the character of this business as far as its commercial side had been developed. It is quite conceivable that a similar problem may arise in connection with submarine signaling, now in its experimental stage.

**§ 133. Telegraph lines.**

The telegraph by the middle of the last century was rapidly becoming a commonplace of everyday commerce. That without regulation by law the telegraph companies could dictate their own terms was obvious from the first in view of the general situation. And casting about for law to control them an analogy was forced between the transmission of a message and the carriage of a package, because it was well recognized that in common carriage reasonable service was obligatory. Almost from the earliest times, therefore, the telegraph service has been held to be a public employment. It is difficult to select one case for quotation among so many at one's disposal, but perhaps the various elements combining to make the telegraph service public in character are best set forth in short compass in a recent North Carolina case [1] where Mr. Justice Douglass said: "A telegraph company is a quasi-public corporation—private in the owner-

[1] Green v. Telegraph Co., 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955 (1904).

ship of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a separate legal existence, perpetual succession and freedom from individual liability; and possesses also in addition thereto the extraordinary privileges which under our Constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. Among the extraordinary privileges enjoyed by such corporations is the condemnation of private property, which can never be taken for a private purpose. The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraph company is essentially public in its duties. Without such public duties there would be neither reason for its creation nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests." [1]

[1] The cases involving the proposition that telegraph companies are in public service are practically innumerable; from this mass a selection is made in which the general principle is stated particularly well:

*United States.*—Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 45 L. ed. 765, 21 S. Ct. 561 (1901).

*Alabama.*—New Orleans, M. & T. R. R. Co. v. Southern & A. Telegraph Co., 53 Ala. 211 (1875).

*Arkansas.*—Western Union Telegraph Co. v. Short, 53 Ark. 434, 14 S. W. 649 (1890).

*Florida.*—Western Union Telegraph Co. v. Hyer Bros., 22 Fla. 637, 1 So. 129, 1 Am. St. Rep. 222 (1886).

*Georgia.*—Dunn v. Western Union Telegraph Co., 2 Ga. App. 845 (1907).

*Illinois.*—Tyler & Co. v. Western Union Telegraph Co., 60 Ill. 421, 14 Am. Rep. 38 (1871).

*Indiana.*—Western Union Telegraph Co. v. Harding, 103 Ind. 505, 3 N. E. 172 (1885).

*Maine.*—Bartlett v. Western Union Telegraph Co., 62 Me. 209, 16 Am. Rep. 437 (1873).

*Massachusetts.*—Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7 (1883).

*Michigan.*—Western Union Tele-

## § 134. Wireless telegraph.

Within the last few years the transmission of electrical signals between distant points without the use of wire has become practicable by the use of a powerful apparatus for sending and a delicate mechanism for receiving. Although the construction of a wireless telegraph system will be much less expensive than the usual plant required, still the fact will remain that when a sender brings a message to a wireless company, the service he asks is infinitesimal in comparison with the whole business of the company. And there can be no doubt whatever that whole law of ordinary telegraphing will be applied to wireless telegraphy.[1] "This action against a wireless telegraph company which first makes its appearance in this

graph Co. v. Carew, 15 Mich. 525 (1867).

*Mississippi.*—Western Union Telegraph Co. v. Allen, 66 Miss. 549, 6 So. 461 (1889).

*Missouri.*—Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609 (1896).

*Nebraska.*—Pacific Telegraph Co. v. Underwood, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490 (1893).

*New Jersey.*—State v. American Com. News Co., 43 N. J. L. 381 (1881).

*New York.*—De Rutte v. New York, A. & B. Electric Magnetic Telegraph Co., 1 Daly, 547 (1866).

*Pennsylvania.*—New York & W. Printing Telegraph Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338 (1860).

*South Carolina.*—Pinckney Bros. v. Western Union Telegraph Co., 19 S. C. 71, 45 Am. Rep. 765 (1882).

*South Dakota.*—Kirby v. Western Union Telegraph Co., 4 So. Dak. 439, 57 N. W. 199 (1892).

*Texas.*—Western Union Telegraph Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052 (1904).

*Utah.*—Wertz v. Western Union Telegraph Co., 7 Utah, 446, 27 Pac. 172, 13 L. R. A. 510 (1891).

*Vermont.*—Gillis v. Western Union Telegraph Co., 61 Vt. 461, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917 (1889).

*Virginia.*—Western Union Telegraph Co. v. Reynolds Bros., 77 Va. 173, 46 Am. Rep. 715 (1883).

[1] There is already a case in the books against one such wireless telegraph company, not involving, however, its duties to one wishing to send a message. Copland v. American DeForest Wireless Telegraph Co., 136 N. C. 11, 48 S. E. 501 (1904).

court proves the oft repeated observation that every phase of life, the customs, pursuits and progress of a people, soon or late, are photographed in the records of its courts as flies are preserved in amber and as the rays of the sun are imprisoned in the diamond."

**§ 135. Submarine cables.**

The argument of the necessary dependence of the person served upon getting the service asked is far greater in respect to the submarine cable; for alternative methods of transmitting intelligence are disproportionately disadvantageous across the sea than across the land. As the first cable was laid many years after the first telegraph was established the law was prepared to treat the cable like the telegraph, as indeed it is in the essential respect of the transmission of symbols to a distance by means of electricity. This unity of the problem under discussion is thus set forth by Mr. Justice Henshaw in Davis v. Pacific Telephone & Telegraph Company [1] where the general rule of considering telegraphs and telephones as interchangeable terms in statutory provisions was followed. "In the very early history of the telegraph it is a matter of common knowledge that there was an actual recordation of letters under the Morse code; that soon passed away and the telegraph operator of to-day receives by sound upon a principle no different from that which obtains in the telephone. Again in the case of submarine cables neither sound nor writing is always employed, but the varied deflections of an indicator within sight of the receiver serve the like purpose. The words, therefore, cannot be limited to their etymological meaning."

**§ 136. Telephone systems.**

The best example of public duty based upon the virtual

[1] 127 Cal. 312, 59 Pac. 698 (1899).

monopoly of the established plant is the telephone company. In the case of the telephone, duplicate services must be provided. From an economic point of view the duplication of plant that is necessary to make competition possible in this public utility is sheer waste, without compensating advantages. From a business point of view this fact is a most effective deterrent; when one of these public services is established in a neighborhood, it is infrequent that men will be found to invest their money in the construction of another plant. Therefore, the best discussion of the nature of public calling is to be found in the cases concerning the telephone. And since almost all of these are common-law decisions, they disclose the essential tests by which public calling is established. From the many excellent decisions discussing the public nature of the telephone system, State v. Nebraska Telephone Company [1] is selected because of its full working out of the problem. In that case the company refused to comply with the relator's request for a telephone, giving various excuses which the court held invalid; and thereupon a mandamus was granted ordering the telephone company to fulfill its public duty to the applicant. Upon the general issue Mr. Justice Reese said: "While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the State, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes

[1] 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885).

satisfying. It is also true that the respondent is not possessed of any special privileges under the statutes of the State, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the 'plant' of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day makes the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of this new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent." [1]

[1] The language used in the telephone cases gives the best idea of the prevailing conditions which determine public employment at common law.

*United States.*—Chesapeake & Potomac Telephone Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. 881 (1902); State v. Bell Telephone Co., 23 Fed. 539 (1885); Delaware & A. Telegraph & Telephone Co. v. State of Delaware, 50 Fed. 677, 2 C. C. A. 1 (1892); Cumberland Telephone & T. Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268 (1908).

*Illinois.*—Chicago Telephone Co. v. Illinois Mfgrs. Assn., 106 Ill. App. 54 (1903).

*Indiana.*—Central Union Telephone Co. v. State ex rel. Falley, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (1888).

*Kentucky.*—Louisville Transfer Co. v. American District Telegraph Co., 1 Ky. L. J. 144 (1881).

*Maryland.*—Chesapeake & Potomac Telephone Co. v. Baltimore

## § 137. Ticker service.

The ticker service by which corporations organized for the purpose distribute by electrical devices quotations gathered at the exchanges is a striking example of a business given its public character by reason of its virtual monopoly. In an early New York case,[1] it was held that defendants are a public corporation under obligation to render their services impartially and without discrimination to all persons who comply with their reasonable rules. And as has recently been held in an Indiana case,[2] when a general telegraph company buys the continuous quotations of a board of trade, and supplies them at a fixed price to such persons as desire them for such a

& Ohio Telegraph Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167, B. & W. 183 (1886).

*Missouri.*—State v. Kinlock Telephone Co., 93 Mo. App. 349, 67 S. W. 684 (1902).

*Nebraska.*—Nebraska Telephone Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113 (1898).

*New Jersey.*—Duke v. Central N. J. Telephone Co., 53 N. J. L. 341, 21 Atl. 460 (1891).

*New York.*—People v. Hudson R. Telephone Co., 19 Abb. N. C. 466 (1887).

*Ohio.*—State v. Bell Telephone Co., 36 Oh. St. 296, 38 Am. Rep. 583 (1880).

*North Carolina.*—Godwin v. Carolina Tel. & Tel. Co., 136 N. C. 158, 48 S. E. 636 (1904).

*Pennsylvania.*—Bell Telephone Co. v. Commonwealth, 3 Atl. 825 (1886).

*South Carolina.*—State v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870 (1901).

*Rhode Island.*—Gardner v. Providence Telephone Co., 23 R. I. 312, 49 Atl. 1004, 50 Atl. 1014, 55 L. R. A. 113 (1901).

*Vermont.*—Commercial Union Telegraph Co. v. New Eng. Telephone Co., 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. Rep. 893 (1888).

But see American Rapid Telegraph Co. v. Connecticut Telephone Co., 49 Conn. 352 (1881), which, however, must now be regarded as obsolete.

[1] Shepard v. Gold & Stock Telegraph Co., 38 Hun, 338 (1885).

See Smith v. Gold & S. Tel. Co., 42 Hun, 454 (1886).

See also Davis v. Electric Reporting Co., 19 Weekly N. C. 567 (1887).

[2] Western Union Telegraph Co. v. State ex rel. Hammond Elevator Co., 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153 (1905).

See also Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. 637 (1905).

length of time that they become necessary to the successful conduct of business in the products covered by the quotations, it cannot, while continuing this business, refuse to supply them to anyone able to pay for them and willing to be governed by its reasonable rules and regulations in reference thereto.

**§ 138. Associated press.**

Whether an established monopoly is real or fictitious, natural or accidental, is the principal question. A fundamental case that comes to mind at this point is Inter-Ocean Publishing Company v. Associated Press.[1] The plaintiff newspaper had regularly taken the news of the defendant bureau. One of the by-laws of the Associated Press forbade members from buying news of any other agency, notwithstanding which the plaintiff took specials of the Sun Publishing Association. Thereupon the Associated Press enforced its by-law against the plaintiff, which was the basis of the suit. In the Supreme Court of Illinois Mr. Justice Phillips held the by-law bad upon general principles. "The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from

[1] 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184 (1900).

such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property." [1]

### *Topic C. Inadequacy of Available Substitutes*

**§ 139. Insufficient substitutes for service.**

It is of course rare that the possibilities in any given case will be so restricted that if the applicant is refused service by the particular company no alternative is open

[1] The following cases seem to be in accord with the principal case on general principles:

*United States.*—Board of Trade v. Christie Grain & S. Co., 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. 637 (1905).

*Indiana.*—Western Union Telegraph Co. v. State ex rel. Hammond Elevator Co., 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153 (1905).

On the other hand, the following cases seem to hold the news business as a private enterprise, at least unless it has professed general service.

*Missouri.*—State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368 (1900).

*New York.*—Matthews v. Associated Press, 136 N. Y. 333, 32 N. E. 981, 32 Am. St. Rep. 741 (1893).

to him; usually in some way or other he could hit upon some way out in such a case. But the alternative offered will often be an inadequate substitute, disadvantageous to a greater or lesser degree. In such a situation there is no effectual competition to regulate the action of the original company, and without the interposition of the law there might be great oppression. A householder refused water by the established company might haul water from the river in hogsheads, but this method is obviously no real substitute. A traveler refused food and shelter might purchase provisions and tenting, yet he will pay an extortionate price rather than be put to that. Indeed the mere fact that there are two gas companies in a town is not enough to alter the fact that the situation is essentially monopolistic, for if one may refuse service, the other may also; and obviously where there are competing telephone systems the service of one is not a substitute for the other.

**§ 140. Public stores.**

The warehousing of staple commodities in the course of commercial transactions is to a certain extent universally regarded as affected with a public interest. Where there is some legal privilege connected with the service, as in the case of the bonded warehouse,[1] or some special circumstances creating a monopoly as in the case of the wharfinger,[2] the courts hold the business public. And in the case of the storage of certain staples there are decisions that the warehouses in question are public, such as grain elevators,[3] tobacco warehouses.[4] In view of these particular examples just mentioned it would seem that generalization is justifiable, that those who conduct the business of warehousing staples upon a pub-

[1] See § 54, *supra*.
[2] See § 102, *supra*.
[3] See § 141, *infra*.
[4] See § 142, *infra*.

lic basis owe peculiar duties to the public. And indeed that public warehousmen constitute at least a peculiar class is recognized in recent statutes [1] and to some extent in the current decisions concerning them.[2]

## § 141. Grain storage.

That warehousing in general is public in character would seem to be proved by the later cases involving grain elevators. In Munn v. Illinois [3] it will be remembered the virtual monopoly of the Chicago elevators by reason of the scarcity of proper sites for conducting the business of transferring grain from railroads to lake boats was much insisted upon. But in a later case, Brass v. North Dakota,[4] where the validity of a statute applying generally in all circumstances throughout an entire State was questioned, the United States Supreme Court held the business of grain storage public in character, Mr. Justice Shiras saying, "When it is once admitted as it must be admitted here that it is competent for the legis-

[1] In contemplation of such statutes a warehouseman is defined to be the owner of a warehouse; one who, as a business, and for hire, keeps and stores the goods of others, a person who receives goods and merchandise to be stored in his warehouse for hire. Butcher v. Commonwealth, 103 Pa. St. 528 (1883).

[2] Only such corporations as are authorized by the law under which they are organized to carry on the business of warehousemen can avail themselves of the provision of said act. Franklin National Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302 (1898).

[3] 94 U. S. 113, 24 L. ed. 77 (1876).

[4] 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. 857 (1894).

That the business of grain storage may be regarded as public in character is shown by the following cases:

*Illinois.*—Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902).

*Minnesota.*—Vega S. S. Co. v. Consolidated Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484 (1899), and cases cited.

*Missouri.*—Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801 (1890).

*New York.*—People v. Budd, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460 (1889).

lative power to control the business of elevating and storing grain whether carried on by individuals or by associations in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and under other circumstances."

**§ 142. Tobacco warehouses.**

This commanding position, however established, is the persistent factor in the establishment of public employment. The most extreme case of this sort is Nash v. Page,[1] involving the position of tobacco warehouses. That case was a controversy between the proprietors of ten of the tobacco warehouses in the city of Louisville, and the appellants, twenty-seven in number, who were dealers in tobacco. It appeared that the appellants had been denied the right to make purchases of tobacco at the warehouses of which the defendants were the proprietors, upon the basis of a general restriction which had been lately attempted to members of the Board of Trade. The opinion of Mr. Justice Pryor is one of the most significant on this subject: "Since the formation of the State government, the sale of this great staple has been fostered and protected by legislation. Such warehouses have always been regulated by law for the benefit of the producer as well as those who are proprietors of these warehouses, and the latter have assumed an obligation to the public which exists as long as they continue public warehousemen. It is a conceded fact that more than five millions in value of tobacco annually find its way from the producer to the warehouses in that city. The greater part of this product is grown within the State, and the producer has almost of necessity to place his tobacco under the control of and for sale by these several ware-

[1] 80 Ky. 539, 44 Am. Rep. 490 (1882).

housemen at public auction. All this tobacco must necessarily pass through these warehouses, subject to such charges as are reasonable and proper. Such a public duty may be imposed on these warehousemen in express terms or by implication, but whether so imposed or not, it arises from the facts of the case. In this great tobacco center the producer is restricted to these public warehouses, or rather these public warehouses have a mutual monopoly of the sales of tobacco at auction, and the fact that there is more than one or a dozen such warehouses cannot affect the question." [1]

**§ 143. Cold storage.**

It would seem that in view of the usual situation the law requiring public service might well be applied to the cold storage warehouses, so necessary are they in the provision business; especially as the small dealer who is refused storage is at great disadvantage in many market contingencies. The few cases that relate to the obligations of those conducting cold storage warehouses have already gone so far as to question the right of the proprietors to exempt themselves from neglect of their undertaking to maintain proper refrigeration.[2] At the same time it is, of course, clear that they are not like common carriers liable as insurers of the provisions stored with them.[3]

[1] Pannell v. Louisville Tobacco Warehouse Co., 113 Ky. 630, 68 S. W. 662, 23 Ky. Law. Rep. 2423, 82 S. W. 1141 (1902); Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky. 165, 20 Ky. Law Rep. 1747, 49 S. W. 1069, 57 L. R. A. 33 (1899)—*accord.*

[2] *Michigan.*—Rudell v. Grand Rapids Cold Storage Co., 136 Mich. 528, 99 N. W. 756 (1904).

*Minnesota.*—Minnesota B. & C. Co. v. St. Paul Cold-Storage Warehouse Co., 75 Minn. 445, 77 N. W. 977, 74 Am. St. Rep. 515 (1899).

[3] *Connecticut.*—Allen v. Somers, 73 Conn. 355, 47 Atl. 653, 52 L. R. A. 106 n., 84 Am. St. Rep. 158 (1900).

*New Zealand.*—Canterbury Meat Co. v. Shaw & Co., 7 L. R. (N. Z.) 708 (1889).

**§ 144. Safe deposit vaults.**

The question may arise in the near future whether the safe deposit vaults as at present conducted should not be obliged to serve all that apply in accordance with their undertaking. It would seem that many of the elements that create public employment are present in their business. Their vaults are constructed at great cost, while the individual charge is relatively small; and they are not in fact numerous, although their service meets a real necessity in modern life. And particularly there is no sufficient substitute for the service they render in the use of a private safe, so that the person whom they might capriciously refuse would be at a real disadvantage. These elements taken together are by other analogies sufficient to put the business within the class of public services.[1]

**§ 145. Market places.**

In accordance with the principles which have been brought out in this topic, it would seem probable that market places provided for the sale of necessary commodities are public in character.[2] The few modern cases that deal with this subject deal mostly with the provision of such market places by public authorities. That public powers may be exercised in the construction of such market places is indeed proof enough that their maintenance is a public purpose. In justifying the taking of land by eminent domain for such a produce market for market gardeners, the Supreme Court of New York said: "It is a public market for the benefit of the public where the sale of certain commodities takes place and where therefore they can be found and the erection of

[1] See Safe Deposit Co. of Pittsburg v. Pollock, 85 Pa. St. 391, 27 Am. Rep. 660 (1877).

[2] Ketchum v. Buffalo, 14 N. Y. 356 (1856).

which must consequently be regarded as a public convenience.[1]

**§ 146. Stock exchanges.**

It is an interesting question how far the law that has been developed in this chapter would go in justifying public regulation of the stock exchanges, which many people now demand.[2] The stock exchanges stood out against public opinion not long since, asserting their private right to make such arrangements as they pleased in making public their current quotations. But the law generally was found to be able to deal with this public demand for indiscriminate publication upon the common-law principles of public service, holding that the property right of the stock exchange in their current quotations had been impressed with a public use, and that they must see to it that all proper persons who applied for such quotations were served indiscriminately. This general demand for the enforcement of obligations to the public upon exchanges by reason of their virtual monopoly is comparatively recent and its further development can hardly be predicted.[3]

*Topic D. Subordinate Services*

**§ 147. Dependent position.**

For the conduct of certain public businesses connection with the facilities of another public service is necessary.

[1] Matter of Cooper, 28 Hun, 515 (1883).

[2] As has been noted, the public necessity of maintaining an open market led the Kentucky court to hold that all proper brokers must be admitted to the privileges of the tobacco auction rooms. Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490 (1882), discussed in § 126, *supra*.

[3] The ruling case at present appears to be American L. S. Commission Co. v. Chicago L. S. Exchange, 143 Ill. 210, 32 N. E. 274, 36 Am. St. Rep. 385, 10 L. R. A. 190 (1892), in which the court declined to decide upon common principles that the exchanges were necessarily public in character upon the ground that the case being doubtful, legislative declaration of this was desirable.

The opportunity to carry on such dependent services at all is necessarily limited; and the dependent service is usually without competition. Thus the companies that furnish special passenger car service, as parlor cars and sleeping cars, are few in number; and so are the companies which provide special freight car service, as express cars and refrigerator cars. This would be so by the nature of the case in any event; but since by the weight of authority it is permissible to make an exclusive contract with one subordinate company the situation is most usually one of complete monopoly. The same situation leads to the same results in various terminal services also, such as those of hackmen and baggage transfer men, teamsters and truckmen. Most of these services which have just been listed are elaborately discussed elsewhere.

**§ 148. Port lighters.**

In all ports there are lightermen ready for employment by the shipping public.[1] So important are these to casual shippers that there is high probability of serious abuse of their practical monopoly which they have for the time being. By the situation itself they seem to be affected with a public interest and, therefore, subject to public regulation. The public character of their business is shown by the fact that if such lightermen take actual possession of the goods they are handling they are held to be common carriers; but if the owner retains control they are of course not carriers at all [2] within this rule.

**§ 149. Floating elevators.**

In large ports where grain is commonly transshipped,

[1] The most of the law as to lighterage is to be found in the early case of Liver Alkali Co. v. Johnson, L. Rep. 9 Exch. 338 (1874).

[2] Boyes v. Moss & Co., 18 Vict. L. R. 225 (1892).

floating elevators will usually be found which are at disposal of shipping interests in general. These eleva in the port of New York, for example, proceed under t own power to the dock or anchorage indicated upon o and charge fixed rates for elevating grain from c boats to ocean steamships. These elevators in New Y are subject to the same regulation as other grain el tors. In the leading case [1] this regulation is justi squarely upon the existence of virtual monopoly in kinds of grain elevating. "In the harbor of New Y the evidence informs us at least five different busi firms operate and control floating elevators and t charges are fixed by a committee of the Produce Excha of which body some or all of these firms are memb It is apparent, therefore, that the opportunity for tual monopoly is the same in each case."

**§ 150. Tugboats.**

Tugboats play an indispensable part in the comm of a port, principally towing sailing vessels, hel steamships, and incidentally moving about barges lighters, floats and scows. In performing these serv which have been described it is obvious that the tug does not act as a carrier, as the possession of the go remains with the vessel. And therefore the many c holding that such incidental towage is not common riage and not subject to the extreme liabilities which common law lays upon common carriers are undoubte correct as towage is usually conducted.[2] On the o hand, it would seem to be true that as conducted in n

[1] Matter of Annon, 50 Hun, 413 (1888), affirmed in 117 N. Y. 621.

[2] Compare Alexander v. Greene, 3 Hill, 9, 7 ibid. 533 (1842) and cases cited, § 173, *infra*, holding towage not carriage with Bussey & Co. v. Mississippi Valley Transp. Co La. Ann. 165, 13 Am. Rep. (1872), holding a towing li common carrier. For full cit on these points see § 173, *infra*

ports, tugboat service is so affected with a public interest as to be subject to public regulation. It is with this impelling them that some cases have gone so far as to hold this service to be common carriage; but as will be seen later, these cases upon examination will usually prove to involve more than mere towage.

**§ 151. Switching engines.**

The switching engines perform a similar service for freight cars that towboats do for freight barges. Such haulage is not usually common carriage [1] any more than towage is; for in neither case is possession assumed in conducting the transportation. The position of these belt lines has already been considered. It is enough at this point to refer again to these decisions in which such transfer service is held to be common carriage and subject to that law but under circumstances essentially different from the mere switching here described.[2]

**§ 152. Parlor cars.**

There is an obvious public demand for car service different from the ordinary coach provided by the railroads generally. Upon long runs a sleeping car is an absolute necessity and so is a dining car, unless as rarely happens the journey is broken by the train stopping for the night at a convenient town where hotel accommodation may be had, or as often happens the train is scheduled to stop at eating houses. Moreover, although there is not the actual necessity, perhaps, there is a public demand

[1] See:

*United States.*—Kentucky & I. Bridge Co. v. Louisville & N. Ry., 37 Fed. 567 (1889).

*Illinois.*—Swift & Co. v. Ronan, 103 Ill. App. 475 (1902).

And see § 150, *supra.*

[2] See:

*Nebraska.*—State ex rel. v. Union Stockyards Co., 81 Neb. 67, 115 N. W. 627 (1908).

*Virginia.*—Norfolk & P. Belt Line v. Commonwealth, 103 Va. 289, 49 S. E. 39 (1904).

See § 181, following.

for parlor cars for day travel, and this is within the public service professed when such facilities are offered. It is much the same here as with smoking cars. It is doubtful if there is any obligation to provide them, but if they are offered they are open to all desirous of using them for smoking. At all events "the business of running drawing-room cars in connection with ordinary passenger cars has become one of the common incidents of passenger traffic on the leading railroads of the country."[1]

## § 153. Sleeping cars.

It is as to sleeping cars particularly that the most of litigation has taken place, and the part played by these car companies has been worked out. In the insistent desire to put these companies under public obligations, the contention has sometimes been made that the sleeping car was a sort of public inn, as one exceptional case [2] held, or a common carrier, as another exceptional case decided.[3] A sleeping car is not an inn;[4] in reality it is a facility for

[1] Quoted from Thorpe v. New York C. & H. R. R. R., 76 N. Y. at p. 407 (1879).

[2] Pullman P. C. Co. v. Lowe, 28 Neb. 239, 44 N. W. 226, 6 L. R. A. 809, 26 Am. St. Rep. 325 (1889).

[3] Pullman P. C. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897).

[4] *United States.*—Blum v. Southern P. P. C. Co., 1 Flip. 500, Fed. Cas. No. 1,574 (1876).

*Alabama.*—Pullman P. C. Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767 (1898).

*Georgia.*—Pullman's P. C. Co. v. Hall, 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293 (1899).

*Illinois.*—Pullman P. C. Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258 (1874).

*Indiana.*—Woodruff S. & P. C. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102 (1882).

*Massachusetts.*—Whicher v. Boston & A. R. R., 176 Mass. 275, 57 N. E. 601, 79 Am. St. Rep. 314 (1900).

*Mississippi.*—Illinois C. R. R. v. Handy, 63 Miss. 609, 56 Am. Rep. 846 (1886).

*New York.*—Welch v. Pullman P. C. Co., 16 Abb. Pr. (N. S.) 352 (1874).

*Tennessee.*—Pullman P. C. Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, 42 Am. St. Rep. 902, 21 L. R. A. 298 (1893).

a traveling passenger. Nor is it a carrier,[1] for the railroad is that. Though neither an innkeeper nor a carrier, the sleeping-car company is engaged in an analogous public employment, and must serve such members of the public as are within the class which it undertakes to serve.[2] As Mr. Justice Mulkey said in Nevin v. Pullman Palace Car Company:[3] "The running of these sleepers has become a business and social necessity. Such being the case, can it be maintained the law imposes no obligations or restrictions on this company in the discharge of its duties to the public? Or, more accurately put, is it true that this company owes no duties to the public except such are due from one mere private person to another? Can it be possible that the common carrier, the ferryman, the innkeeper, and even the blacksmith on the roadside, are all, by mere force of law, placed under special obligations and duties to the public which they are bound to observe in the exercise of their respective callings, while, at the same time, this company is entirely relieved from

[1] *United States.*—Lemon v. Pullman P. C. Co., 52 Fed. 262 (1887).

*Alabama.*—Pullman P. C. Co. v. Adams, 120 Ala. 581, 24 So. 921, 74 Am. St. Rep. 53, 45 L. R. A. 767 (1898).

*Colorado.*—Pullman P. C. Co. v. Freudenstein, 3 Col. App. 540, 34 Pac. 578 (1893).

*Georgia.*—Pullman's P. C. Co. v. Hall, 106 Ga. 765, 32 S. E. 923, 71 Am. St. Rep. 293 (1899).

*Illinois.*—Pullman P. C. Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258 (1874).

*Indiana.*—Woodruff S. & P. C. Co. v. Diehl, 84 Ind. 474, 43 Am. Rep. 102 (1882).

*Kentucky.*—Pullman P. C. Co. v. Gaylord, 9 Ky. L. Rep. 58 (1887).

*Massachusetts.*—Dawley v. Wagner P. C. Co., 169 Mass. 315, 47 N. E. 1024 (1897).

*New York.*—Tracy v. Pullman P. C. Co., 67 How. Pr. 154 (1884).

[2] See especially:

*United States.*—Searles v. Mann Co., 45 Fed. 330 (1891).

*Illinois.*—Nevin v. Pullman P. C. Co., 106 Ill. 222, 46 Am. Rep. 688 (1883).

*Massachusetts.*—Lawrence v. Pullman P. C. Co., 144 Mass. 1, 10 N. E. 723 '59 Am. Rep. 58 (1887).

*Texas.*—Pullman P. C. Co. v. Booth (Civ. App.), 28 S. W. 719 (1894).

[3] 106 Ill. 222, 46 Am. Rep. 688 (1883).

the observance of all such duties and obligations which are not expressly contracted for? We think not. To so hold would be to unjustly discriminate between parties similarly situated, and make the law inconsistent with itself, to the great detriment of the public."

**§ 154. Refrigerator cars.**

Similar in character is the special freight car service now so prevalent in railroad operation. To meet certain needs of certain classes of shippers car companies are organized which provide the appropriate equipment. Thus there are companies providing refrigerator cars and ventilator cars for special uses, and tank cars and stock cars for certain traffic. The position of these private freight car services is substantially similar to that of the private passenger car services just discussed; it is again not a case of common carriage, the railway company performs the carriage, the car company furnishing merely additional conveniences. Thus, to take as one prominent example, the refrigerator car line. Although not technically a carrier, the refrigerator car line is carrying on a business which is of public importance in connection with the railway, and like the sleeping-car company, it is therefore engaged in a public employment which, though not identical with that of a common carrier, is analogous to it, and imposes similar legal obligations upon the corporation.[1]

**§ 155. Tank cars.**

To take another illustration, the same thing would be true of a tank car line. As a matter of fact the tank car lines seem usually to have been owned or controlled by private shippers and used by them for their own ship-

[1] See the discussion of this problem in Re Transportation of Fruit, 10 Int. Com. Rep. 360 (1904).

ments only. In such a case there seems to be no question of public employment since there is no undertaking to serve people generally.[1] But although not technically carriers, the conductors of the private car business as a class, when upon a public basis, are necessarily in the public employment and engaged in a calling analogous to that of the common carrier; and statutory regulations adopted for the control of common carriers often apply to them.

**§ 156. Necessary regulation of virtual monopoly.**

A review of all of the instances which have been cited in the course of this whole discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes put forward between the undertaking of a public service in contradistinction to the furnishing of a public supply. Now, it is true that most of the cases are cases of service—the railway and the warehouse, for example; but other of the cases are of supply,—the waterworks and gas works, for instance. Indeed, there is nothing in this distinction, either in economics or in law. It is submitted that any business is made out to be public in character where there is a virtual monopoly inherent in the nature of things. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature. On the other hand, if effective competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character. Under our constitutional system a distinction is made upon this line. In the public calling, regulation of service, facilities, prices and dis-

[1] See the discussion of this problem in State v. Cincinnati, N. O. & T. P. Ry., 47 Oh. St. 130, 23 N. E. 928, 7 L. R. A. 319 (1890).

criminations is possible to any extent. Monopolistic conditions demand such policy; and at no period in history has this been more apparent than now. In the private callings no such legislation should be permitted. Where competitive conditions prevail there should be freedom; and at no epoch in our industries has it been more important to insist upon this.

# CHAPTER V

## COMMON CARRIAGE AS A PUBLIC EMPLOYMENT

§ 160. Who are common carriers.

*Topic A. Carriers of Goods*

§ 161. Pack carriers.
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165. Shipmasters.
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175. Automobile lines.
176. Railways.
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179. Pneumatic tubes.
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*Topic B. Carriers of Passengers*

§ 182. Ferries.
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184. Stagecoaches.
185. Omnibus lines.
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189. Street railways.
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§ 191. Underground railways.
192. Interurban railways.
193. Passenger elevators.
194. Moving platforms.
195. Pleasure railways.
196. Common carriage as a public employment.

## § 160. Who are common carriers.

As will be seen later in more detail, common carriage involves a particular kind of service.[1] The conception of carriage itself involves not only transportation but control during the transit. To be common carriage this particular business must be upon the basis of public service. In this view of it there are various callings which although upon a public basis are not common carriage, although once analogized to it to bring them within the law governing public service at a time when the extent of that law

[1] Good definitions of common carriage abound. See the following cases among others:

*United States.*—United States v. Sioux City Stockyards Co., 162 Fed. 556 (1908).

*Alabama.*—Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695 (1842)

*Georgia.*—Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847).

*Illinois.*—Illinois Central R. R. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92 (1870).

*Kentucky.*—Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466 (1834).

*Maryland.*—Carpenter v. Baltimore & O. R. Co. (Md.), 64 Atl. 252 (1906).

*Massachusetts.*—Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133 (1822).

*Nebraska.*—State ex rel. v. Union Stockyards Co., 81 Neb. 67, 115 N. W. 627 (1908).

*New Hampshire.*—Shelden v. Robinson, 7 N. H. 157, 26 Am. Dec. 726 (1834).

*New Jersey.*—Mershon v. Hobensack, 22 N. J. L. 372 (1850).

*New York.*—Alexander v. Greene, 7 Hill, 533 (1844).

*Oregon.*—Honeyman v. Oregon, etc., R. Co., 13 Oreg. 352, 10 Pac. 628, 57 Am. Rep. 20 (1886).

*Pennsylvania.*—Gordon v. Hutchinson, 1 W. & S. 285, B. & W. 3, 37 Am. Dec. 464 (1841).

*South Carolina.*—Bamberg v. So. Carolina R. Co., 9 S. C. 61, 30 Am. Rep. 13 (1877).

*West Virginia.*—Maslin v. Baltimore & O. R. R. Co., 14 W. Va. 180, 35 Am. Rep. 748 (1878).

*Wisconsin.*—Doty v. Strong, 1 Pinn. 313, 40 Am. Dec. 773 (1843).

*England.*—Gisbourn v. Hurst, 1 Salk. 249 (1710).

was not appreciated. Thus even irrigation and telegraphing were once said in argument to be similar to common carriage in order to bring them within the obligations of public service. And it took decisions to show for example that towboat men and wharfingers were not liable as common carriers; and yet clearly enough in the first no possession is taken although transportation is undertaken, and in the second there is no moving but merely possession. The traditional division of common carriers is into carriers of goods and carriers of passengers. In strictness only carriage of goods presents true bailment; and although to a certain extent the control which the carrier of passengers exercises is sufficiently analogous, yet the distinction between them is strong enough to make one measure of liability for the common carrier of goods and another for the carrier of passengers. There are some problems as to this division, but mostly these are difficulties in application. Thus after some litigation, the carriage of slaves was held to be passenger carriage, while the carriage of cattle was held to be freight carriage. Moreover, many carriers transport both passengers and freight, although some confine their business to one or the other. Still the established division is too settled to ignore.

### *Topic A. Carriers of Goods*

**§ 161. Pack carriers.**

The earliest form of common carriage in England was by means of pack horses. The country roads were not adapted for wheeled vehicles, and the carrier was obliged to carry his goods on the horses' backs in panniers. Such were the two carriers who appear in the first part of Shakespeare's Henry IV.[1] One of them had "a gammon of bacon and two razes of ginger to be delivered as far as

[1] Act II, scene 1.

Charing-cross," while the other had turkeys in his pannier. Such also was the carrier who took certain bales to carry to Southampton, and by breaking open the bales and stealing the contents provided a leading case in the law of larceny.[1]

### § 162. Wagoners.

As the roads grew better and traffic between different parts of the country consequently increased, goods began to be carried in wagons; and the common carrier by land was a wagoner or carter. This continued to be the common method of land carriage of goods down to the invention of railroads, and such carriers might unquestionably be common carriers. The many cases involving wagoners are concerned with the question of fact, often difficult to determine, whether in the particular case the carriage was undertaken as common carriage or whether it was a case of special arrangement upon a private basis.[2]

### § 163. Porters.

It is said in many cases, early and recent, that porters who undertake as a regular business to carry packages from point to point or to aid in loading or unloading goods are engaged in a public employment and are accordingly subject to public regulation as to the conduct of their business.[3]

[1] Y. B. 13 Ed. IV, 9, pl. 5 (1473).

[2] At this descriptive stage it is sufficient to cite the leading cases which are discussed later.

*Delaware.*—Tunnel v. Pettijohn, 2 Harr. 48 (1836).

*Georgia.*—Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847).

*Kentucky.*—Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466 (1834).

*Mississippi.*—Harrison v. Roy, 39 Miss. 396 (1860).

*Ohio.*—Samms v. Stewart, 20 Ohio, 70, 55 Am. Dec. 445 (1851).

*Pennsylvania.*—Gordon v. Hutchinson, 1 W. & S. 285, 37 Am. Dec. 464, B. & W. 3 (1841).

*Texas.*—Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639 n. (1847).

*England.*—Gisbourn v. Hurst, 1 Salk. 249 (1710).

[3] See Robertson v. Kennedy, 2 Dana (Ky.), 430, 26 Am. Dec. 466. And see Jackson Architectural I. Wks. Co. v. Hurlbut, 158 N. Y. 34,

**§ 164. Hoymen.**

As in the case of land carriage, so in the case of water carriage, there are carriers who do not ply regularly between fixed termini, but carry for those who employ them anywhere on a certain river or within a certain harbor. There are several early cases concerning the Thames watermen [1] who transfer goods from vessel to shore or from vessel to vessel. Such hoymen are ordinary carriers, at least, though whether they are common carriers or not may depend upon the nature of their profession. If, however, the lighterman does not take the goods, but they remain in the control and possession of the owner, the lighterman is to be regarded as merely furnishing the motive power: not taking possession he cannot be technically a carrier.

**§ 165. Shipmasters.**

At the very first there seem to have been doubts as to whether carriers by sea who went beyond the realm were within the common-law rules as to the liability of common carriers. But that there was no essential difference between carriage by land and carriage by sea was established at a comparatively early day. In this country there was never any doubts of this as the following summary taken from the opinion of Mr. Justice Williams in an early Connecticut case [2] will show: "It was long since settled that any man undertaking for hire to carry the goods of all persons indifferently, from place to place, is a common carrier. Common carriers, says Judge Kent, consist of

52 N. E. 665, 70 Am. St. Rep. 432 (1899).

[1] Liver Alkali Co. v. Johnson, L. R. 9 Exch. 338 (1874); Ingate v. Christie, 3 C. & K. 61 (1850); Maving v. Todd, 4 Campb. 225, 1 Starkie, 72 (1815); Dale v. Hall, 1 Wils. Reports, 281 (1750); Trent., etc., Nav. Co. v. Wood, 4 Dougl. 287, 3 Esp. 127 (1785).

[2] Hale v. New Jersey Nav. Co., 15 Conn. 539, 39 Am. Dec. 398 (1843).

two distinct classes of men, viz., inland carriers by land or water, and carriers by sea; and in the aggregate body are included the owners of stage-coaches, who carry goods, as well as passengers for hire,—wagoners, teamsters, cartmen, the masters and owners of ships, vessels and all water-craft, including steam vessels and steam towboats belonging to internal as well as coasting and foreign navigation, lightermen and ferrymen. And there is no difference between a land and a water carrier." [1]

**§ 166. Canal boats.**

Transportation over most canals has been largely carried on from the time of their first construction to the present day by canal boatmen who take possession of the goods to be forwarded, store them in their canal boats, keep charge over them during the transit, and make provision for the beasts by which the boats are usually hauled from point to point. Obviously this business is carriage, and if it is professed for all that apply it is common carriage, and subject to all the liabilities of common carriage. As is said in one of the early cases,[2] "The counsel have not contended but that the defendant's

[1] See for other examples:

*United States.*—Propeller Niagara v. Cordes, 21 How. 7, 16 L. ed. 41 (1858); Clark v. Barnwell, 12 How. 272, 13 L. ed. 985 (1851); The Delaware, 14 Wall. 579, 20 L. ed. 779 (1871); The Maggie Hammond, 9 Wall. 435, 19 L. ed. 772 (1869); The Gold Hunter, 1 Blatchf. & H. 300, 10 Fed. Cas. 5,513 (1832); The Phenix Insurance Co. v. Liverpool & G. W. Steamship Co., 22 Blatchf. 372, *sub nom.* The Montana, 22 Fed. 715 (1884).

*Connecticut.*—Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745 (1838).

*Georgia.*—Brown v. Clayton, 12 Ga. 564 (1853).

*Massachusetts.*—Gage v. Tirrell, 9 Allen, 299 (1864).

*New York.*—Elliott v. Rossell, 10 Johns. 1, 6 Am. Dec. 306 (1813).

*South Carolina.*—Swindler v. Hilliard, 2 Rich. 286, 45 Am. Dec. 732 (1845).

*England.*—Laveroni v. Drury, 8 Exch. 166, 16 Eng. L. & E. 510 (1852).

[2] Spencer v. Daggett, 2 Vt. 92 (1829).

liability stood upon the principles of a common carrier. It should so stand. He carries for hire. The plaintiffs could not control him in the manner of lading and navigating his boat."[1]

**§ 167. River craft.**

Upon similar principles the cases generally have held the owners of river craft transporting goods to the strict liability of common carriers.[2] This has been so whether these were flatboats carried down the river by the current guided by their steersmen, or whether they were boats proceeding along the river by their own motive power. In some jurisdictions the necessity of this law was felt so strongly that the courts were much too easily satisfied as to the public character of a particular undertaking. But as is said in the leading case[3] of this sort: "One who undertakes for a reward, to convey produce or goods of any sort, from one place upon the river to another, becomes thereby liable as a common carrier; having to transact the business entrusted to his care, at places distant from the residence of the plaintiff, it is always difficult, and frequently impossible for the plaintiff to obtain the evidence necessary to fix fraud or negligence on the defendant; and to super-

[1] See for other examples:
*New York.*—Fish v. Clark, 49 N. Y. 122 (1872).
*North Carolina.*—Williams v. Branson, 1 Murphy, 417, 4 Am. Dec. 562 (1810).
*Pennsylvania.*—Humphreys v. Reed, 6 Whart. 435 (1841).
*South Carolina.*—Harrington v. Lyles, 2 Nott & McCord, 88 (1819).
*Vermont.*—Spencer v. Daggett, 2 Vt. 92 (1829).
*England.*—Hyde v. Trenton Nav. Co., 5 T. R. 389 (1793).

[2] *New Hampshire.*—Elkins v. Boston & Maine R. R. Co., 3 Fost. 275 (1851).
*Pennsylvania.*—Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Sup. Ct. 575 (1904).
*South Carolina.*—M'Clures v. Hammond, 1 Bay, 99, 1 Am. Dec. 598 (1790).
*West Virginia.*—Gillingham v. Ohio River R. R., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827 (1891).

[3] Moss v. Bettis, 4 Heisk. 661. (1871).

sede this difficulty, the law throws the burthen of proof upon the defendant, to exempt himself from the plaintiff's action, and makes him liable for all accidents but those which are occasioned by the acts of God or of a public enemy."

**§ 168. Draymen.**

Draymen of all sorts may be common carriers if they have generally undertaken to transport the goods of all who apply, for a reasonable compensation. The vehicle employed is immaterial. In one early case,[1] the question was whether a proprietor of an ox team dragging a sled laden with general merchandise was a common carrier, and the court held that he was. "Every one who pursues the business of transporting goods for hire, for the public generally, is a common carrier. According to the most approved definition, a common carrier is one, who undertakes, for hire or reward, to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen, and porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So also does the driver of a slide with an ox team. The mode of transporting is immaterial."[2]

**§ 169. Truckmen.**

The case of the truckman also well illustrates the general principles. Even where a truckman is professing publicly the business of carrying goods from one part of a town to another, a few authorities discussed in the next section have held that he is not a common carrier. But there should be, of course, no doubt that he is a carrier essentially as he both takes possession of the goods of his

[1] Robinson & Co. v. Kennedy, 2 Dana, 430 (1834), 26 Am. Dec. 466.

[2] See also Robinson v. Cornish, 13 N. Y. Supp. 577 (1890).

patrons and transports them.[1] The law is summarized succinctly in the leading case of Jackson Architectural Iron Works v. Hurlbut [2] by Mr. Justice O'Brien thus: "Truckmen, wagoners, cartmen and porters who undertake to carry goods for hire as a common employment in a city, or from one town to another, are common carriers."

**§ 170. Furniture movers.**

But mere movers, such as furniture movers, will seldom be found to have undertaken as common carriers. Their business is generally conducted upon the basis of special contract; and they do not undertake, upon any general schedule of prices, to serve all that apply. Moreover, there are usually numerous carters with whom the person who wishes the service might deal, and as it is a matter arranged for in advance there is ample opportunity offered for access to these competitors. Naturally enough, therefore, the few cases that deal with this matter hold that the furniture movers are liable only as private carriers. It is of course a question of fact, in last analysis, and it may be shown, always, just what the facts are as

[1] *Illinois.*—Hastings Express Co. v. Chicago, 135 Ill. App. 268 (1907); See also Johnson Exp. Co. v. Chicago, 136 Ill. App. 368 (1907).

*Indiana.*—Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309 (1902).

*Kentucky.*—Farley v. Lavary, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383 (1900).

*Pennsylvania.*—Lloyd v. Haugh & K. Storage & Transfer Co., 223 Pa. St. 148, 72 Atl. 576, 21 L. R. A. (N. S.) 188 (1909).

*Utah.*—Benson v. Oregon S. L. Ry. Co., 99 Pac. 1072 (1909).

*Washington.*—Gates v. Bekins, 44 Wash. 422, 87 Pac. 505 (1906).

*England.*—Scaife v. Farrant, L. R. 10 Ex. 358 (1875).

*Canada.*—Culvar v. Lester, 37 Can. L. J. 421 (1901).

[2] 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899).

But in several cases of trucking the courts have not found common carriage. See:

*New Hampshire.*—Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431 (1895).

*Wisconsin.*—Hooper v. Chicago & N. W. Ry. Co., 27 Wis. 81, 9 Am. Rep. 439 (1870).

to the business in question. As is said in one case:[1] "Whether a person was a common carrier bound by all the extraordinary responsibility and entitled to the privilege of that class of bailees can sometimes be known only by particular proof of how his business was conducted and what profession he made to the public regarding it."[2]

**§ 171. Baggage transfer.**

On the other hand, omnibus lines that transfer passengers and their baggage across cities to their destinations are obviously within the conception of common carriers. A square case in point is Parmelee v. McNulty,[3] where Mr. Chief Justice Caton said: "It is further objected that the court assumed that Parmelee was a common carrier, without proof of that fact. The proof showed that he was the owner of an omnibus line, to the agents of which the proof tended to show the trunk was delivered. The court was authorized to take notice that the owner of an omnibus line is a common carrier, just as much as the owner of a railroad or of a line of steamboats. The court

[1] Thompson v. New York Storage Co., 97 Mo. App. 135, 70 S. W. 938 (1902).

[2] Cases finding no common carriage in the arrangement in question are:

*Illinois.*—Armfield v. Humphrey, 12 Ill. App. 90 (1882).

*Missouri.*—Jamiet v. American Storage Co., 109 Mo. App. 257, 84 S. W. 128 (1904). But see Collier v. Langan T. S. & M. Co. (Mo. App.), 127 S. W. 435 (1910).

*New Hampshire.*—Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431 (1895).

*South Carolina.*—Piedmont Mfg. Co. v. Railroad Co., 19 So. Car. 353 (1882).

Cases finding common carriage in the moving in question are:

*New York.*—Snelling v. Yetter, 25 App. Div. 590, 49 N. Y. Supp. 917 (1898).

*Pennsylvania.*—Lloyd v. Haugh & K. Transfer Co., 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188 (1909).

*Utah.*—Benson v. Oregon S. L. Ry. Co. 99 Pac. 1072 (1909).

*Washington.*—Gates v. Bekins, 44 Wash. 422, 87 Pac. 505 (1906).

[3] 19 Ill. 556 (1858).

will take notice of the general meaning of words; and we know that an omnibus line means a line of coaches for the carriage of passengers and their baggage."[1]

**§ 172. Steamboats.**

The invention of the application of steam propulsion to vessels did not alter the rule already established that those who carry goods and passengers as a general business by any vehicles or vessels are common carriers. The business is therefore public in character, provided that those who conduct it profess to serve all that apply, which may be established by the usual tests already discussed. A few representative cases are collected in the footnote; In one of the earliest of these, Bennett v. Filyard [2] the instances of common carriage by water are thus enumerated: "A common carrier in law has been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place as a business and not as a casual occupation *pro hac vice*. Common carriers by water are the masters and owners of ships, and all water crafts including steam vessels, towboats, and other steamboats, belonging to internal as well as coasting and foreign navigation, lightmen, hoymen, ferrymen, canal boatmen, and others en-

[1] To the same effect are:

*Georgia.*—Atlanta Baggage, etc., Co. v. Mizo, 4 Ga. App. 407, 61 S. E. 844 (1908).

*Illinois.*—Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276 (1874).

*Louisiana.*—Da Ponte v. New Orleans Transfer Co., 42 La. Ann. 696, 7 So. 608 (1890).

*New Hampshire.*—Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811 (1903).

*New York.*—Richards v. Wescott, 2 Bosw. 589.

*North Carolina.*—Herring v. Utley, 8 Jones, L. 270 (1860).

*Pennsylvania.*—Beckman v. Shouse, 5 Rawle, 179, 28 Am. Dec. 653 (1835).

*Virginia.*—Norfolk & W. Ry. Co. v. Old Dominion Baggage Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722 (1901).

[2] 1 Fla. 403 (1847).

gaged in the transportation of goods by water for persons generally for hire."[1]

## § 173. Towing lines.

To what extent towboats are engaged in a public employment is a vexed question; but the difficulty seems to lie more in the determination of the question of fact in the cases that have arisen than in any difference as to legal possibilities. One of the principal cases is Bussey & Co. v. Mississippi Valley Transportation Co.[2] The regular business of the defendants in that case was proved to be the towing of barges upon the route between St. Louis and New Orleans. The court reviewed fully the various authorities apparently bearing upon the point; the opinion of Mr. Justice Howe concluding much as follows: "Such conflict of authority might be very distressing to the student, but for the fact that when these

[1] *United States.*—The Commander in Chief, 1 Wall. 43, 17 L. ed. 609 (1863); Jencks v. Coleman, 2 Sumner, 221, Fed. Cas. 7,258 (1835); Citizens' Bl. v. Nantucket Steamboat Co., 2 Story, 16, B. & W. 8, Fed. Cas. 2,730 (1841).

*Alabama.*—Jones v. Pitcher, 3 Stew. & P. 136 (1833).

*Connecticut.*—Crosby v. Fitch, 12 Conn. 410 (1838).

*Georgia.*—Ocean S. S. Co. v. Savannah L. W. & S. Co. (Ga.) 63 S. E. 577, 20 L. R. A. (N. S.) 867 (1909).

*Illinois.*—Dunseth v. Wade, 2 Scam. 285 (1840).

*Kansas.*—The Emily, 5 Kans. 645 (1864).

*Louisiana.*—Oakey v. Russell, 6 Martin (N. S.), 58 (1827).

*Maine.*—Parker v. Flagg, 26 Me. 181 (1846).

*Massachusetts.*—Hastings v. Pepper, 11 Pick. 41 (1838).

*Mississippi.*—Gilmore v. Carman, 1 Sm. & M. 279 (1843).

*New York.*—Hollister v. Nowlen, 19 Wend. 234 (1838); Cole v. Goodwin, 19 Wend. 251 (1838); McArthur v. Sears, 21 Wend. 190 (1839); Pardee v. Drew, 25 Wend. 459 (1841).

*Ohio.*—McGregor v. Kilgore, 6 Ohio, 359 (1834).

*Pennsylvania.*—Harrington v. McShane, 2 Watts, 443 (1834).

*South Carolina.*—Faulkner v. Wright, Rice (Law), 107 (1838); McClures v. Hammond, 1 Bay, 99, 1 Am. Dec. 598 (1790).

*Tennessee.*—Kirkland v. Montgomery, 1 Swan, 452 (1852).

[2] 24 La. Ann. 165, 13 Am. Rep. 120 (1872).

writers and cases cited by them are examined the discrepancy is more imaginary than real. There are two very different ways in which a steam towboat may be employed, and it is likely that Mr. Story was contemplating one method and Mr. Kent the other. In the first place it may be employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed termini. It might well be said that under such circumstances the towboat or tug is not a common carrier. But a second and quite different method of employing a towboat is where she plies regularly between fixed termini, towing for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor the property thus transported. Such is the case at bar." If therefore the towing line is really making a business of carrying, that is, if it actually takes control of the barges towed and itself transports them, the towboat proprietors are common carriers.[1] But if we have the case of the harbor tug which is engaged in towing along vessels which remain in the control of their masters we do not have common carriage as the most of cases hold [2] although very likely we have a case of public employment.[3]

[1] *United States.*—See Vanderslice v. The Superior, 28 Fed. Cas. 16,843 (1850).

*California.*—White v. Mary Ann, 6 Cal. 462, 65 Am. Dec. 523 (1856).

*Louisiana.*—Clapp v. Stanton, 20 La. Ann. 495, 96 Am. Dec. 417 (1868).

*North Carolina.*—Walston v. Myers, 5 Jones, 174 (1857).

*New Jersey.*—Ashmore v. Penn. St. Towing, etc., Co., 28 N. J. L. 180 (1860).

[2] *United States.*—Steamer New Philadelphia, 1 Black, 62, 17 L. ed. 84 (1861); The Quickstep, 9 Wall. 665, 19 L. ed. 767 (1869); Steamer

[3] See § 150, *supra.*

**§ 174. Wagon trains.**

At one stage of the development of a country, the wagon train often appears after the single wagon and before the railroad construction. One interesting case from the American frontier is Seligman v. Armijo.[1] In that case settling the preliminary point of whether it was a case of common carriage the court said: "The plaintiff having sent his train to Junction City without any special agreement for freight to transport for reward the goods of such as might employ him, and having undertaken to carry goods for the defendants and others, thereby assumed the duties, obligations and liabilities of a common carrier in respect to the goods carried by him."

Webb, 14 Wall. 406, 20 L. ed. 774 (1871); The Margaret, 94 U. S. 494, 24 L. ed. 146 (1876); Transportation Line v. Hope, 95 U. S. 297, 24 L. ed. 477; (1877) The Princeton, 3 Blatch. 54, Fed. Cas. 11,434 (1853); The Lyon, 1 Brown's Adm. 59, 15 Fed. Cas. 8,645 (1861); Steamboat Angelina Corning, 1 Ben. 109, Fed. Cas. 384 (1867); The Stranger, 1 Brown's Adm. 281, Fed. Cas. 13,525 (1871); The Oconto, 5 Biss. 460, Fed. Cas. 10,421 (1873); The Merrimac, 2 Sawyer, 586, Fed. Cas. 9,478 (1874).

*Illinois.*—Knapp v. McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290 (1899).

*Kentucky.*—Varble v. Bigley, 14 Bush, 698, 29 Am. Rep. 435 (1879).

*Maryland.*—Penn., etc., Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543 (1836).

*Massachusetts.*—Sproul v. Hemmingway, 14 Pick. 1, 25 Am. Dec. 350 (1833).

*New York.*—Caton v. Rumney, 13 Wend. 387 (1835); Alexander v. Greene, 3 Hill, 9, 7 ibid. 533 (1842); Wells v. Steam Nav. Co., 2 N. Y. 204 (1849); Wells v. Steam Navigation Company, 2 Com. 204, 4 Seld. 375 (1853); Merrich v. Brainard, 38 Barb. 574 (1860); Arctic Fire Ins. Co. v. Austin, 54 Barb. 559 (1869); Abbey v. Steamboat Stevens, 22 How. Pr. 78 (1861); Emiliusen v. Penn. R. Co., 30 N. Y. App. Div. 203, 51 N. Y. Suppl. 606 (1898).

*Pennsylvania.*—Leonard v. Henrickson, 18 Pa. St. 40, 55 Am. Dec. 587 (1851); Hays v. Paul, 51 Pa. St. 134 (1865); Brown v. Clegg, 63 Pa. St. 51 (1869); Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445 (1874).

*England.*—The Julia, 14 Moore P. C. 210 (1860); Symonds v. Pain, 6 Hurl & N. 709 (1861); The Minnehaha, 1 Lush, 335 (1861).

[1] 1 N. Mex. 459 (1870).

**§ 175. Automobile lines.**

In modern times in new districts the automobile line often supplants the wagon train in the later development of the frontier. These lines of cars cross long stretches of country at high speed crossing frail-appearing bridges specially constructed to fit their wheels. As this is now becoming one of the commonplaces of transportation in these regions, cases dealing with their relations with the public may soon be expected. In the cities as well the automobile truck is supplanting the horse drawn wagon for express service. It may take the law some little time to adjust itself to these new conditions, simply because in restrictive statutes one is permitted to quibble.[1]

**§ 176. Railways.**

It is a matter of history that where the first railways were laid down at the beginning of the nineteenth century the theory upon which they were constructed was that they would be public highways, for the use of which those that drove their vehicles over them should pay toll as for the use of a turnpike or a canal. The introduction of the steam locomotive brought about the end of that theory almost before it was put into practice. A train drawn by a locomotive was too expensive, the operation was too costly, and its management too intricate for any shipper, or even for any private carrier. Almost from the outset, therefore, the railway company provided and operated the engines and cars themselves, and accepted for transportation such goods as were offered. They thus became common carriers. The cases that hold this form so enormous a list that it is difficult to select any one in particular

[1] See Fousler v. Atlantic City, 70 N. J. L. 125, 56 Atl. 119 (1905), permitting general regulation of automobile service upon the basis that this constitutes common carriage whatever be the power utilized for locomotion.

as an illustration.[1] Indeed all courts will take judicial knowledge that public railways are common carriers. In one of the earlier cases, Chicago & Aurora Railroad v. Thompson,[2] the appellant railroad denied that it was a common carrier because the charter of the corporation did not declare it to be so, but Mr. Justice Breese said: "We suppose it is not necessary that the charter should provide in so many words that the railroad companies created by them shall be common carriers. The authorities are numerous to the point that such companies using cars for the purpose of carrying goods for all persons indifferently, for hire, and whose custom and uniform practice it is to do so are common carriers and liable as such. There can be no doubt on this point. There needs no legislative declaration to make them such."

## § 177. Industrial railways.

It has already been pointed out, however, that it will not do to say even to-day that all those who maintain

[1] *United States.*—Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627 (1873).

*Alabama.*—South Western R. Co. v. Webb, 48 Ala. 585 (1872).

*California.*—Contra, Costa R. R. Co. v. Moss, 23 Cal. 323 (1863).

*Connecticut.*—Fuller v. Naugatuck R. R. Co., 21 Conn. 557 (1852).

*Georgia.*—East Tenn., etc., R. Co. v. Whittle, 27 Ga. 535, 73 Am. Dec. 741 (1859).

*Illinois.*—Illinois Railroad Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92 (1870).

*Indiana.*—McCleary v. Babcock, 169 Ind. 228, 82 N. E. 453 (1907).

*Maine.*—New England Exp. Co. v. Maine C. R. R. Co., 57 Me. 188, 2 Am. Rep. 31 (1869).

*Massachusetts.*—Thomas v. Boston & P. R. R. Co., 10 Metc. 472, 43 Am. Dec. 444 (1845).

*Nebraska.*—St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335 (1893).

*New Hampshire.*—Elkins v. Boston & M. R. R., 23 N. H. 275 (1851).

*New Jersey.*—Rogers Locomotive Works v. Erie Railway Co., 5 C. E. Green, 379 (1869).

*Vermont.*—State v. Boston, C. & M. R. R. Co., 25 Vt. 433 (1853).

*Washington.*—Boyle v. Great Northern Ry. Co., 13 Wash. 383, 43 Pac. 344 (1896).

*West Virginia.*—Laurel Fork & S. H. R. Co. v. West Virginia T. Co., 25 W. Va. 324 (1884).

[2] 19 Ill. 578 (1858).

railway trackage even if they have devoted it to public service are engaged in common carriage. They may only furnish facilities over which other carriers may run their trains as do bridge companies [1] and terminal companies,[2] or they may undertake to furnish the motive power to switch the trains of others about and yet not so take possession as to be carriers which is often the case of union railways [3] and belt lines.[4] But in dealing with these services we may often come upon common carriage in fact where the connecting railway both takes possession and furnishes the motive power, in which case they would be common carriers.[5] An added importance has accrued to this subject because of the recent invention of a kind of railway known as the "industrial" railway. This is a short line of railway, owned by an industrial corporation or by the owners of some business enterprise, and connecting the factory or the place of business with the main line of some railway.[6] When such a road, however short it may be, is actually operated independently with its own locomotives and cars, it would seem to be an independent carrier, though it is operated for the exclusive benefit of the industrial enterprise which owns it provided it would accept such general traffic along its line as might be offered to it.

### § 178. Express companies.

The business of transporting small or valuable goods has come largely into the hands of express companies. So far as such companies merely transmit parcels locally in their own teams, they are evidently carriers. The more important work of the companies, however, is done in

[1] See § 126, *supra*.
[2] See § 125, *supra*.
[3] See § 129, *supra*.
[4] See § 130, *supra*.
[5] Fleming v. Kansas City Suburban Belt R. R., 89 Mo. App. 129 (1901).
[6] See United States v. Atchison, T. & S. F. Ry. Co., 142 Fed. 176 (1905).

connection with the carriage of parcels over a long distance over the lines of railways or steamboats. The express company has at the place of departure a local agent who receives the parcel for transmission; it is then transported over the line of a railway or steamboat, but always in a part of the train or boat set aside for the express company, and at all times in the control and care of an agent of the company; and upon the arrival of the train or boat at the place of destination the parcel is taken by a local agent and by him delivered to the consignee. At first the express companies attempted to maintain that they were only forwarders under such circumstances—not carriers, properly speaking. But it is now well recognized that their service constitutes carriage since they retain possession throughout.[1] And as they exercise this

[1] *United States.*—Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174, 23 L. ed. 872; Missouri, K. & T. Ry. v. Dinsmore, 108 U. S. 30, 27 L. ed. 640, 2 Sup. Ct. 9 (1883).

*Alabama.*—Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140 (1870).

*Colorado.*—Overland Express Co. v. Carroll, 7 Col. 43, 1 Pac. 682 (1883).

*District of Columbia.*—Galt v. Adams Express Co., MacArthur and M. 124, 48 Am. Rep. 742 (1879).

*Florida.*—Southern Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107 (1880).

*Georgia.*—Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783 (1867).

*Illinois.*—Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191 (1879).

*Indiana.*—United States Express Co. v. State, 164 Ind. 196, 73 N. E. 101 (1905).

*Kansas.*—Adams Exp. Co. v. McConnell, 27 Kans. 238 (1882).

*Massachusetts.*—Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68 (1867).

*Michigan.*—United States Exp. Co. v. Root, 47 Mich. 231, 10 N. W. 351 (1881).

*Minnesota.*—Christenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122 (1870).

*Missouri.*—Kirby v. Adams Express Co., 2 Mo. App. 369 (1876).

*New York.*—Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575 (1872).

*Ohio.*—American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561 (1878).

*Oregon.*—Bennett v. Northern Exp. Co., 12 Oreg. 49, 6 Pac. 160 (1885).

*Pennsylvania.*—Grogan v. Adams

employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services, there has never been any doubt that their employment was sufficiently public to make it a case of common carriage. Their service is therefore at the disposal of the public in general.[1]

**§ 179. Pneumatic tubes.**

A company operating lines of pneumatic tubes under the streets of a city for the transportation of small parcels for the general public would undoubtedly be a public service corporation and obliged, therefore, to transport for all suitable parcels at reasonable rates without discrimination.[2] Some few examples of this sort of service are known, but just at present the use of this system of transportation seems to be confined to the government which contracts for their exclusive service in handling the mails.

Exp. Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360 (1886).

*South Carolina.*—Stadhecker v. Combs, 9 Rich. Law, 193 (1856).

*Tennessee.*—Southern Exp. Co. v. Womack, 1 Heisk. 256 (1870).

*Texas.*—Pacific Exp. Co. v. Darnell, 62 Texas, 639 (1884).

*Vermont.*—Hadd v. United States Exp. Co., 52 Vt. 335, 36 Am. Rep. 757 (1880).

*Wisconsin.*—Wells v. American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695 (1882).

[1] In the following cases particularly the public duty of the express companies is emphasized:

*United States.*—Platt v. Le Cocq, 150 Fed. 391 (1906).

*Georgia.*—Southern Express Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185 (1905).

*Indiana.*—Adams Express Co. v. State, 161 Ind. 328, 67 N. E. 1033 (1903).

*Mississippi.*—Southern Express Co. v. Moon, 39 Miss. 822 (1863).

*Nebraska.*—State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, 18 L. R. A. (N. S.) 664 (1908).

*North Carolina.*—Alsop v. Southern Express Co., 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271 (1889).

*Canada.*—Johnson v. Dominion Exp. Co., 28 Ont. Rep. 203 (1896).

[2] This was assumed in Astor v. Arcade Ry. Co., 113 N. Y. 93, 20 N. E. 594, 2 L. R. A. 789 n. aff. 48 Hun, 562, 1 N. Y. Supp. 174 (1888).

As these contracts are the basis upon which these lines are constructed and operated they show that there is no general profession to serve the public contemplated, and therefore the business is not as yet upon a public basis.

**§ 180. Dispatch companies.**

The same question came up several times for decision in regard to the dispatch companies. These freight lines again claimed that they were forwarders only and not carriers at all; but the courts held consistently that as they took possession they were carriers, and that as they professed a common calling they were common carriers. One representative case where these companies were charged as common carriers will do for all—Merchants' Transportation Company v. Bloch Brothers,[1]—in which it was said: "This instruction properly treats the defendant as a common carrier. The duties which it undertakes, and which it holds itself out to the public as willing to undertake and perform, give it that character. In very many cases it has been expressly adjudged to be a common carrier, and in others such has been assumed to be its character without a discussion of the question. The text-writers say that dispatch companies are common carriers, and class them with express companies because of the many points of similarity in their business, and the fact that they alike generally use the vehicles of others in the transportation of freight.[2]

[1] 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847 (1888).

[2] *Colorado.*—Merchants' Dispatch Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757 (1877).

*Illinois.*—Merchants' Dispatch Co. v. Bolles, 80 Ill. 473 (1875); Merchants' Dispatch Co. v. Leysor, 89 Ill. 43 (1878); Merchants' Dispatch Co. v. Joesting, 89 Ill. 153 (1878).

*Iowa.*—Cownie Glove Co. v. Merchants' Dispatch Co., 130 Iowa, 327, 106 N. W. 749, 4 L. R. A. (N. S.) 1060 (1906); Robinson v. Merchants' Dispatch Co., 45 Iowa, 470 (1877); Stewart v. Merchants' Dispatch Co., 47 Iowa, 229 (1877); Wilde v. Merchants' Dispatch Co., 47 Iowa, 247 (1877); Bancroft v. Merchants' Dispatch Co., 47 Iowa, 262 (1877).

### § 181. Fast freight lines.

The nature of the fast freight lines which so often are advertised is always a question of fact. Sometimes these will be found to be dispatch companies, such as have just been described,[1] operating under this name. As usually distinguished from dispatch companies, however, these fast freight lines will generally be found to be maintained directly by the railways concerned themselves. As, however, this service is offered to the public as through carriage, shippers are led to deal with the line itself in this matter; and the railways concerned in establishing these fast freight lines are generally held to be liable practically as partners *pro hac vice*.[2]

## *Topic B. Carriers of Passengers*

### § 182. Ferries.

The ferryman, as has been seen, has been in public employment from time immemorial. Obviously a ferryman is a common carrier of goods if it is shown that he has taken the goods into his control; but he does not usually do so. He more commonly takes passengers only, and if the passengers have goods they commonly keep possession of their property.[3] But whether he usually carries passen-

*New York.*—Mercantile M. & Ins. Co. v. Chase, 1 E. D. Smith, 115 (1850).

[1] See particularly Merchants' Transportation Co. v. Bloch Bros., 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847 (1888). See also Baxter & Co. v. Wheeler et al., 49 N. H. 9 (1869).

[2] See, for one example, Rocky Mount Mills v. Wilmington & W. R. Co., 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854 (1896). And for another Wyman v. Chicago & A. R. R. Co., 14 Mo. App. 35 (1877).

[3] *Alabama.*—Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695 (1842); Frierson v. Frazier, 142 Ala. 232, 37 So. 825 (1904).

*Arkansas.*—Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595 (1870).

*California.*—May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135 (1855).

*Illinois.*—Claypool v. McAllister, 20 Ill. 504 (1858).

*Iowa.*—Whitmore v. Bowman, 4 Green, 148 (1853).

*Kentucky.*—Hall v. Renfo, 3 Met. 51 (1860).

*Massachusetts.*—Le Barron v.

gers only or goods only he may obviously be shown to be a common carrier.[1] The law then imposes upon him the duties and liabilities of a common carrier of passengers or of goods or of both as the case may be.

**§ 183. Ships.**

That vessels of all kinds may be common carriers of goods has already been pointed out. It is also obvious that if their proprietors have also undertaken the carriage of passengers they will be liable as public carriers. In summing up to the jury in the leading case [2] dealing with carriers of passengers by water, Judge Story said, "There is no doubt that this steamboat is a common carrier of passengers for hire; and therefore the defendant as commander was bound to take the plaintiff as a passenger on board if he had suitable accommodations and there was no reasonable objection to the character or conduct of the plaintiff."[3]

East B. Ferry Co., 11 Allen, 312, 87 Am. Dec. 717 (1865).

*Mississippi.*—Powell v. Mills, 37 Miss. 691 (1859).

*Missouri.*—Pomeroy v. Donaldson, 5 Mo. 36 (1837).

*New York.*—Wyckoff v. Queen's County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650 (1873).

*North Carolina.*—Spivy v. Farmer, 2 Hawy. 339 (1805).

*Ohio.*—Wilson v. Hamilton, 4 Ohio St. 722 (1855).

*Pennsylvania.*—Smith v. Seward, 3 Pa. St. 342 (1846).

*Tennessee.*—Sanders v. Young, 1 Head, 219, 73 Am. Dec. 175 (1858).

*Texas.*—Albright v. Penn, 14 Tex. 290 (1855).

[1] In the following cases among many others the public duties of ferrymen are discussed:

*Alabama.*—Pate v. Henry, 3 Stew. & P. 101 (1833).

*New York.*—Mayor, etc., of New York v. Starin, 106 N. Y. 1, 12 N. E. 631. (1887).

*Virginia.*—Carter v. Commonwealth, 2 Va. Cas. 354 (1823).

*Washington.*—Stevenson v. West Seattle L. & Imp. Co., 22 Wash. 84, 60 Pac. 51 (1900).

[2] Jenks v. Coleman, 2 Sumn. 225 (1835).

[3] See the following cases among many others:

*United States.*—The Pacific, 1 Blatchf. 569 (1850); The Zenobia, 1 Abb. Adm. 48 (1847).

*South Carolina.*—McCleneghan v. Brock, 5 Rich. L. 17 (1851).

*West Virginia.*—Gillingham v. Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827 (1891).

## § 184. Stagecoaches.

The common method of carrying passengers before the invention of railways was by stagecoach; and there can, of course, be no doubt that public coaches are common carriers. In the leading American case, Bennett v. Dutton,[1] Chief Justice Parker said: "We are of opinion that the proprietors of a stagecoach for the regular transportation of passengers for hire from place to place, are, as in the case of common carriers of goods, bound to take all passengers who come so long as they have convenient accommodation for their safe carriage unless there is a sufficient excuse for a refusal."[2]

## § 185. Omnibus lines.

Omnibus lines which transport passengers and their baggage across cities between railroad terminals are obviously carriers of passengers and their baggage. In some few cases this has been contested, but it has been uniformly held that these lines are not only common carriers of their passengers, but also common carriers, strictly, of their baggage, liable for its loss at all events. As is said in one case,[3] "The court will take notice of the

*England.*—Benett v. Peninsular Steamboat Co., 6 C. B. 775 (1848).

[1] 10 N. H. 481 (1839).

[2] As to the public liabilities of proprietors of stagecoaches, see:

*United States.*—Saltonstall v. Stockton, Taney, 11 (1838).

*Connecticut.*—Merwin v. Butler, 17 Conn. 138 (1845).

*Iowa.*—Frink v. Coe, 4 Green, 555, 61 Am. Dec. 141 (1854).

*Kentucky.*—Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466 (1834).

*Maryland.*—Stockton v. Frey, 4 Gill, 406 (1846).

*Massachusetts.*—Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133 (1822).

*New Hampshire.*—Shelden v. Robinson, 7 N. H. 157, 26 Am. Dec. 726 (1834).

*Pennsylvania.*—Beckman v. Shouse, 5 Rawle, 179, 28 Am. Dec. 653 (1835).

*South Carolina.*—Peixotti v. McLaughlin, 1 Strob. L. 468, 47 Am. Dec. 563 (1847).

*Tennessee.*—Walker v. Skipwith, Meigs, 502, 33 Am. Dec. 161 (1838).

*England.*—Lovett v. Hobbs, 2 Show. 127 (1680).

[3] *Illinois.*—Parmelee v. McNulty, 19 Ill. 556 (1858).

general meaning of words, and we know that an omnibus line means a line of coaches for the carriage of passengers and their baggage. If this line was established for other purposes, that should have been shown in the defence." [1]

## § 186. Hacks.

From time immemorial hackmen have been subject to regulation as to the terms which they shall make in rendering their services. As is said in Munn v. Illinois [2] in reviewing the public callings universally recognized: "The hackney coachman pursues a public employment and exercises a sort of public office." As has been seen, at the foundation of this law lie the monopolistic conditions, temporary though they may be, which circumscribe the dealings between the hackman and his passenger, making the situation such that the law must intervene to save him from extortion.[3]

## § 187. Taxicabs.

The latest development in urban service of this sort is the taxicab. These being automobiles are subject to

[1] The following cases deal with this service:

*Georgia.*—Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460 (1852).

*Illinois.*—Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276 (1874).

*Indiana.*—Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602 (1902).

*Missouri.*—Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799 (1878).

*New Jersey.*—See Atlantic City v. Dehn, 69 N. J. L. 233, 54 Atl. 220 (1903).

*New York.*—Powell v. Myers, 26 Wend. 591 (1841).

*Ohio.*—Jones v. Voorhees, 10 Ohio, 145 (1840).

*Pennsylvania.*—M c G i l l v. Rowand, 3 Barr, 451, 45 Am. Dec. 654 (1846).

*Tennessee.*—Bomar v. Maxwell, 9 Humph. 620, 51 Am. Dec. 682 (1849).

*England.*—Brooke v. Pickwick, 4 Bing. 218 (1827).

[2] 94 U. S. 113, 24 L. ed. 77 (1876).

[3] In the following cases among others the propriety of the regulation of the services of hackmen is recognized:

*Iowa.*—Bonce v. Dubuque St. Ry. Co., 53 Iowa, 278, 5 N. W. 177, 36 Am. Rep. 221 (1880).

*New Jersey.*—Combs v. Lakewood, 68 N. J. L. 582, 53 Atl. 697 (1902).

peculiar regulation in their use of the highways. All the general law governing the operation of automobiles relate to them, and a special license is often necessary for those who engage in the business for hire. If they ply the streets for hire they are undoubtedly holding themselves out as common carriers of passengers. Strictly speaking they are not so identified with ordinary hackney carriages as to be within statutes applying to them. "The Legislature, in using the word carriage had no thought of a vehicle made up in large part of complicated machinery and propelled by a powerful engine whose operation is similar to that of locomotive engines on railroads." [1]

**§ 188. Passenger railways.**

It is needless to state that railways in general are public carriers of passengers as well as common carriers of goods. Examples will occur where a railway has confined its carriage to the carriage of goods only,[2] and in such case it cannot be called upon to take passengers. But the usual fact is that it has undertaken to carry passengers [3] as well as goods, and then the railway company is bound as

[1] A public taxicab was thus held not to be a public carriage within the meaning of a penal statute punishing those who evade the established carriage fares in Commonwealth v. Goldman, 205 Mass. 400, 91 N. E. 392 (1910)—quoted in the text. But in Gassenheimer v. District, 26 D. C. App. Cas. 557 (1906) holding a taxicab a vehicle within a statute against loitering.

[2] *Illinois.*—Wiggins Ferry Co. v. East St. Louis V. Ry. Co., 107 Ill. 450 (1883).

*Massachusetts.* — Commonwealth v. Fitchburg R. R. Co., 12 Gray, 180 (1858).

[3] A very few of the many cases that hold that a passenger railroad is a common carrier bound to accept all proper passengers who apply, are subjoined:

*United States.*—Thurston v. Union Pacific R. R. Co., 4 Dillon, 321 (1877).

*Georgia.*—Caldwell v. Richmond & D. R. Co., 89 Ga. 550, 15 S. E. 678 (1892).

*Illinois.*—Galena & C. U. R. R. Co. v. Yarwood, 15 Ill. 468 (1854).

*Indiana.*—Erie Lake & W. Ry. Co. v. Acres, 108 Ind. 548, 9 N. E. 453 (1886).

*North Carolina.*—Story v. Norfolk & S. R. Co., 133 N. C. 59, 45 S. E. 349 (1903).

a common carrier, when not overcrowded, to take all proper persons who may apply for transportation over its line on their complying with reasonable rules of the company.

**§ 189. Street railways.**

Considered merely as an improved omnibus line a street railway is obviously a common carrier of passengers. So clearly is this service public in character that the cases all deal with the extent of their obligations, the primary obligation of public service being assumed. For as was said in a leading case in Washington [1] by Mr. Justice Reeves: "Its franchise was granted to appellant by the State, not for its own profit alone or that of its stockholders, but in a large measure for the public benefit. Peculiar privileges were conferred upon it in consideration that it would provide facilities for communication and for intercourse for the public. It is a common carrier. It was granted the power of eminent domain, a part of the sovereignty of the State, and, with the consent of the municipalities it may lay its tracks over the public streets or highways."[2]

[1] State v. Spokane St. Ry., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739 (1898).

[2] The following are selected almost at random from the innumerable cases which define the public duties of street railways as common carriers of passengers:

*United States.*—Milwaukee Elec. Ry. v. Milwaukee, 87 Fed. 577 (1898).

*California.*—Barrett v. Market St. Ry., 81 Cal. 296, 22 Pac. 859, 15 Am. St. Rep. 61, B. & W. 297 (1889).

*Illinois.*—Dean v. Chicago General Ry., 64 Ill. App. 165 (1896).

*Indiana.*—Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55 (1887).

*Kansas.*—Topeka City Ry. Co. v. Higgs, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754 (1888).

*Massachusetts.* — Commonwealth v. Interstate Consolidated Ry., 187 Mass. 436, 73 N. E. 530, 11 L. A. R. (N. S.) 973 (1905).

*Minnesota.*—State v. St. Paul City Ry. Co., 78 Minn. 331, 81 N. W. 200 (1899).

*Missouri.*—Jackson v. Grand Ave. Ry. Co., 118 Mo. 199, 24 S. W. 192 (1893).

*Montana.*—State v. Helena P. &

### § 190. Elevated railways.

The successive changes in street railways came about by such imperceptible degrees that it was not held that there was in these gradual developments any change in the situation. The motive power utilized was successively horse,[1] cable,[2] steam,[3] and electricity;[4] but still the law regarded street railways as ordinary carriers over the highways. Thus the occupation of the surface of streets for tramways, whatever motive power may be used, has been held not only a public use but so within the original uses as a highway as not to constitute an additional servitude. The construction of elevated railways, however, although admittedly a public use, was held to create an additional servitude by reason of their extensive and permanent occupation of location, and their interference with the light and air of the abutters. This, however, was a close question as a comparison of the majority and minority opinions in the leading case,[5] will show.

### § 191. Underground railways.

Underground railways have the same status of common carriers that all public urban passenger services have.

L. Co., 32 Mont. 391, 56 Pac. 685 (1899).

*Nebraska.*—Pray v. Omaha St. Ry. Co., 44 Neb. 167, 62 N. W. 447, 48 Am. St. Rep. 717 (1895).

*New Jersey.*—State ex rel. City of Bridgeton v. Bridgeton Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837 (1898).

*New York.*—Loader v. Brooklyn Heights R. R. Co., 35 N. Y. Supp. 996, 14 Misc. 208 (1895).

*Oregon.*—Thompson-Houston Elec. Co. v. Simon, 20 Oreg. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86 (1890).

*Pennsylvania.*—Meier v. Pennsylvania R. Co., 64 Pa. St. 225, 3 Am. Rep. 581 (1870).

[1] See Holly v. Atlanta St. Ry. Co., 61 Ga. 215, 34 Am. Rep. 97 (1878)

[2] See Watson v. St. Paul City Ry. Co., 42 Minn. 46, 43 N. W. 904 (1889).

[3] See Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 38 Am. St. Rep. 753 (1893).

[4] See Thompson-Houston Electric Co. v. Simon, 20 Oreg. 60, 25 Pac. 147, 23 Am. St. Rep. 86, 10 L. R. A. 251 (1890).

[5] See Story v. New York Elevated R. R. Co., 90 N. Y. 122 (1882).

This underground railway may be arranged for as has been seen [1] by the construction of subways by public authorities in analogy to highways for the use of which the railway company pays a specified compensation. Or these underground railways may construct their own tunnels under statutes similar to those authorizing the construction of any railroad in which tunneling is incidental merely. In a recent case [2] the Pennsylvania court in deciding such railways to be like other railroads held that such property rights as they invade in such construction they might condemn by eminent domain, paying proper compensation, and thus acquire a permanent right of way underground.

**§ 192. Interurban railways.**

As has been seen, so long as the street railway might be regarded as a development of transportation by such vehicles as omnibuses over highways, it was properly held that its construction involved no additional servitudes upon abutters but that they were in fact an actual relief from congested traffic. The modern interurban railway with its heavy trains operated at high speed over country roads as through traffic is very different as the cases now generally hold. In Zehren v. Milwaukee Electric Railway,[3] to quote one case as an example, Judge Jordan said: "The urban railway has developed into the interurban railway, and threatens soon to develop into the interstate railway. The small car which took up passengers at one corner, and dropped them at another, has become a large coach, approximating the ordinary railway coach in size, and has become a part, perhaps, of a train

[1] Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610 (1896), discussed in § 77, *supra*.

[2] Sparks v. Philadelphia, etc., Ry., 212 Pa. St. 105, 61 Atl. 881 (1905)

[3] 99 Wis. 83, 74 N. W. 538, 41 L. R. A. 575, 67 Am. St. Rep. 844 (1898).

which sweeps across the country from one city to another, bearing its load of passengers ticketed through, with an occasional local passenger picked up on the highway. The purely city purpose which the urban railway subserved has developed into or been supplanted by an entirely different purpose, namely, the transportation of passengers from city to city over long stretches of intervening country." [1]

## § 193. Passenger elevators.

In maintaining and operating an elevator for passengers, the owner is, according to the majority of the cases, under a duty to exercise the same measure of care as is required of a public carrier of passengers, the highest degree of care which human foresight can suggest.[2] But certain other cases refuse to go to this extent, holding that as the owner of the elevator is not engaged in a public calling, there is no occasion for imposing the extraordinary liability.[3] In the matter of exercising care, it may be con-

[1] See also Aurora v. Elgin Traction Co., 227 Ill. 485, 81 N. E. 544, 118 Am. St. Rep. 284 (1907).

[2] *United States.*—Mitchell v. Marker, 62 Fed. 139, 22 U. S. App. 325, 10 C. C. A. 306, 25 L. R. A. 33 (1894).

*Alabama.*—Morgan v. Saks, 143 Ala. 139, 38 So. 848 (1904).

*California.*—Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175 (1889).

*Illinois.*—Chicago Exchange Bldg. Co. v. Nelson, 197 Ill. 334, 64 N. E. 369 (1902).

*Maryland.*—Wise v. Ackerman, 76 Md. 375, 25 Atl. 424 (1892).

*Minnesota.*—Gurney v. Minneapolis Union Elev. Co., 63 Minn. 70, 65 N. W. 136, 30 L. R. A. 534 (1895).

*Missouri.*—Goldsmith v. Holland Bldg. Co., 182 Mo. 597, 81 S. W. 1112 (1904).

*Pennsylvania.*—Fox v. Philadelphia, 208 Pa. St. 127, 57 Atl. 356 (1904).

*Tennessee.*—Southern B. & L. Assn. v. Lawson, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804 (1896).

*Washington.*—Edwards v. Burke, 36 Wash. 107, 78 Pac. 610 (1904).

*Wisconsin.*—Oberndorfer v. Pabst, 100 Wis. 505, 76 N. W. 338 (1898).

[3] *Kentucky.*—Phillips Co. v. Pruitt, 26 Ky. Law Rep. 831, 82 S. W. 628 (1904).

ceded, his position is fairly analogous to that of the common carrier of passengers, but beyond this the analogy ceases. No court, indeed, would regard the owner of the elevator as a common carrier for all purposes in the sense that he is engaged in a public calling and obliged to serve all without discrimination. "Carriers not exercising a common calling as such are not common carriers whatever their liabilities may be. But the defendant did not exercise the common calling of a carrier, as sufficiently appears from the fact that he might have shut the elevator door in the plaintiff's face and arbitrarily have refused to carry him without incurring any liability to him."

**§ 194. Moving platforms.**

A company operating a moving platform by which passengers might be regularly transported from place to place for an established fare would undoubtedly be held a common carrier. Such a method of transportation has been seriously proposed as a method of relief from the congestion of passenger transportation in the city of New York. Just at present this sort of carriage is practically confined to moving stairways. In so far as these are part of the facilities provided by railway companies at their terminals the cases would undoubtedly hold the company liable as a carrier of passengers for any injuries caused in the course of their operation. Such stairways in business buildings would by many cases be held to be covered by the law governing the carriage of passengers in analogy to elevators.

*Massachusetts.*—Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795, 88 Am. St. Rep. 384 (1901), quoted above.

*Michigan.*—Hall v. Murdock, 114 Mich. 233, 72 N. W. 150 (1897).

*New York.*—Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630 (1901).

*Rhode Island.*—Edwards v. Mfrs. Building Co., 27 R. I. 248, 61 Atl. 646, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37 (1905).

**§ 195. Pleasure railways.**

Where any railway is being actually used in regular travel for the use of which a regular fare is paid, it would seem to be a common carrier of passengers. Mountain railways in general, however devised, would seem to come within these conditions. One must be cautious in stating this, however, as there is a decision in the highest court of New York [1] to the effect that eminent domain could not be granted to the Niagara Gorge trolley line, Mr. Justice Andrews saying: "The case does not, we think, differ in principle from an attempt on the part of a private corporation, under color of an Act of the Legislature, to condemn lands for an inclined railway, or for a circular railway, or for an observatory, to promote the enjoyment or convenience of those who may visit the Falls." And it is of course true that there are certain enterprises whereby people are moved about, such as "merry-go-rounds," "scenic railways," "shooting-the-chutes," "ferris wheels," and "roller coasters," which are obviously not common carriage, however willing their proprietors may be to take all who will pay. We are certainly outside the range of real travel now, which alone is properly within the coercive law of public carriage.[2]

**§ 196. Common carriage as a public employment.**

As has been seen, common carriage has for a long time

[1] Matter of the Niagara Falls & W. Railway, 108 N. Y. 375, 15 N. E. 429 (1888).

[2] As to the liability of the proprietors of such pleasure railways, see:

*Illinois.*—O'Callaghan v. Dellwood Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054 (1909), all the care practicable.

*Michigan.*—In Knottnerus v. North Park Street R. Co., 93 Mich. 348, 17 L. R. A. 726, 53 N. W. 529 (1892), not liable as insurer.

*New York.*—Lumsden v. L. A. Thompson Scenic R. Co., 130 App. Div. 209, 114 N. Y. Supp. 421 (1909), not obliged to explain.

*Virginia.* — Washington Luna Park Co. v. Goodrich, 110 Va. 692, 66 S. E. 977 (1910), liable for real negligence.

been regarded as the typical and indeed almost the only public employment; and though the number of public service companies has been greatly increased of late years, it still remains the most important. Upon what grounds is the regulation of common carriers to be justified. Legal privileges are often found, to be sure. Thus eminent domain is granted, the steam roads facilitate their construction, and the use of the streets is given to street railways to conduct their business. But, on the other hand, there are many sorts of common carriers which have no special privileges as, for instance, steamship lines and city truckmen. There must be some wider principle, therefore, which operates in establishing the public duties of common carriers as a class. And this is not to be found in natural monopoly, for there is no reason in nature why there should not be as many carriers as anyone might wish for, but in the virtual monopoly of the established service. In the case of the important carriers to-day—the railway, the street railway, the express company, the steamship line—the enormous amount of money invested discourages and prevents competition. The amount of money necessary to be raised and put at risk in order to enter upon the business of carriage is too great to subject it to competition with an already established and successful enterprise. Even when an investment is made, a competing line of railroad built or a new express company organized, it soon becomes apparent that competition is ruinous to one if not to both of the enterprises, and consolidation results, bringing monopoly again. The business of carriage is essentially monopolistic in character, and therefore the situation calls for the special law regulating established monopoly which it has always received.

# PART II. PUBLIC PROFESSION

## CHAPTER VI

### EXPRESS UNDERTAKING OF PUBLIC EMPLOYMENT

§ 200. Public profession an essential element.

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203. Displaying signs.
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*Topic B. Implicit Undertaking of Public Employment*

§ 211. Charter stipulation.
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**§ 200. Public profession an essential element.**

It should be remembered, in justification of the imposition of the extraordinary law which requires those who are engaged in public callings to serve all that apply, that the service is voluntarily assumed. Even one who has acquired a virtual monopoly is not forced into public

service against his will; it is only when he has held himself out in some way as ready to serve that he is bound thereafter to deal with all indiscriminately. There is no complete case of public employment made out when the business is public in character if there has been in the particular case no profession to serve the public. The converse of this is also true, that there is no case of public employment if the business is private in character, however much eagerness to deal with the public may have been evinced. That is, the rule is fundamental that in any case of public employment the evidence of profession to serve the public and the proof that the business is public in character must both be sufficient to carry conviction. For whether there has been profession enough in the particular instance and whether the business is sufficiently public in its general character is in each instance in last analysis a question of fact, although rules of law may aid in dealing with these facts. And since this is a question of fact rather than a question of law in most cases, the discussion of it requires the statement of many cases involving many close issues of fact. For although the public profession is often enough made in express terms, it is also not infrequently left to implication from the general course of the business in question.

*Topic A. Explicit Profession of Public Service*

**§ 201. Early assumpsit associated with public calling.**

It has been seen [1] that in the course of the development of our law the obligation resting upon one who had made a general assumption of public service preceded the obligation of one who had made a special promise in a particular case. It has been remarked [2] that the earliest cases

[1] See § 4, *infra*.

[2] See Professor Ames on the History of Assumpsit in 2 Harvard Law Review, pp. 2–4, citing es-

in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river but who overloaded the boat, whereby the horse was drowned, against surgeons who undertook to cure the plaintiff or his animals but who administered bad medicines or otherwise unskillfully treated their patients, against a barber who negligently injured the plaintiff's face, and against a smith for laming a horse while shoeing it. The general assumption to the whole public which is the characteristic feature of public employment was the very basis of these actions, for the public profession of a common calling was held to oblige one to act with proper skill in his business relations with each patron.

**§ 202. Express assumption of a public trust.**

In the earlier cases of public employment the profession to serve all that apply was spoken of as the assumption of a public trust in undertaking the business or as the grant to the public of an interest in that business. The original rule was clearly expressed over two centuries ago by Lord Holt.[1] "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; and for that see Keilway, 50. If on the road a shoe falls off my horse, and I come to a smith to have one put on, and the smith refuses to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ

pecially as to the ferryman, Y. B. 22 *Lib. Ass.* 94, pl. 41; as to the surgeon, Y. B. 19 Hen. VI, 49, pl. 5; as to the barber, 14 Hen. VII, Rast. Ent. 2, 6, 1; as to the smith, Y. B. 46 Ed. III, 19, pl. 19.

[1] In Lane v. Cotton, 12 Mod. 472 (1701).

him in the way of his trade." And in many later cases this rather figurative language is used.[1]

**§ 203. Displaying signs.**

It has been usual from time immemorial for an innkeeper to advertise his business by hanging out a sign. "The person who erects the sign," as it is said quaintly in one old case,[2] "charges himself to the commonwealth." But it should be noted that as public profession is a question to be determined upon all the facts, it is not essential that he should do so.[3] If he in fact carries on business as an innkeeper on a public basis he will be held to be such although he is not displaying a sign.[4] One leading case[5] on this matter dealt with a lighterman who had his sign over his door. Baron Alderson had no hesitation in holding him liable as a common carrier. "Here, we have a person with a counting-house, 'lighterman' painted at his door, and he offers to carry for everyone."

**§ 204. Public advertisement.**

The most obvious method of professing public employment is by general advertisement, particularly in newspapers. Such newspaper advertisement has always been common, for railroads particularly as they generally publish their time-tables. Where a carrier was soliciting business publicly in various ways, by signs upon its wagons and upon fences, by its cards and its tags, a court said lately: "These advertisements speak for themselves, and unquestionably establish the fact, independent of every-

[1] See for examples of this:
*United States.*—Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876).
*New York.*—People v. New York C. & H. R. R. R., 28 Hun, 543 (1883).

[2] Quoted from Rex v. Collins, Palmer, 372 (1623).

[3] Anonymous, Godbolt, 345, pl. 440 (1623).

[4] *Iowa.*—Lyon v. Smith, Morris, 184 (1843).
*Tennessee.*—Dickerson v. Rogers, 4 Humph. 179 (1843).

[5] Ingate v. Christie, 3 C. & K. 61 (1850).

thing else in the case, that the defendant does hold itself out to the public."[1] This is equally established as to innkeepers who employ similar methods of publicity. One is held liable as a public innkeeper "who by his agents, cards, bills, advertisements, signs, and all the means by which publicity and notoriety can be given to his business, represents himself as an innkeeper."[2] Of late years also advertising campaigns have been a feature of the competition between gas companies and electric companies, while even telephone and telegraph companies have solicited public patronage through newspaper advertisements.

**§ 205. General solicitation.**

The profession of willingness to serve the public need not be made by the proprietor in any particular way; it is enough if his intention is made public in any way that will give the community to understand that he wishes to do business with all comers. "Whether a person is a common carrier depends wholly upon whether he holds himself out to the world as such, and he can hold himself out as a common carrier by engaging in the business generally, or by announcing or proclaiming it by cards,

[1] Quoted from Lloyd v. Haugh & K. Storage & Transfer Co., 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188 (1909).

See also similar language in:

*Colorado.*—Schloss v. Wood, 11 Colo. 287, 17 Pac. 910 (1888).

*Kansas.*—Kansas Pacific Ry. Co. v. Nichols, Kennedy & Co., 9 Kans. 235, 12 Am. Rep. 494 (1872).

*Massachusetts.*—Sears v. Eastern R. R. Co., 14 Allen, 433, 92 Am. Dec. 780 (1867).

*Pennsylvania.*—Beckman v. Shouse, 5 Rawle, 179, 28 Am. Dec. 653 (1835).

*Tennessee.*—Memphis News Publishing Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150 (1903).

*Wisconsin.*—Doty v. Strong, 1 Pinn. (Wis.) 313, 40 Am. Dec. 773 (1843).

[2] Quoted from Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867).

But see Oxlade v. North Eastern R. R. Co., 1 C. B. (N. S.) 454 (1857).

advertisements, or by any other means that would let the public know that he intended to be a common or general carrier for the public."[1] The employment of agents to solicit business, usually makes a plain case. The court had in one leading case but little doubt as to the status of a keeper of a hotel who not only kept a public register but also "ran a coach to the railroad station to induce guests to come to his house."[2] So, a hackman who stations himself behind a rail at a station and gesticulates to incoming passengers indicates his character,[3] as does a wagoner who takes his stand in a public square.[4]

**§ 206. Express disclaimer.**

The opposite case where there is at the outset an express disclaimer of public service is equally plain. According to the general theory here developed, one gets into public service only by undertaking it voluntarily, and conversely one may keep himself out of it altogether by express disavowal of public employment. This point came up recently in North Carolina,[5] where the question involved was whether a railway projected by a lumber corporation could have the right of eminent domain under a general statute. The company openly declared that it did not propose to transport timber for other parties over the projected road, but intended to construct and operate the road for its sole and exclusive use in removing its timber and lumber from its lands. This attitude, the court held,

[1] Schloss v. Wood, 11 Colo. 287, 17 Pac. 910 (1888).

[2] Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1029, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198 (1892).

[3] See Atlantic City v. Fansler, 70 N. J. L. 491, 56 Atl. 119 (1904).

[4] See Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464 (1841).

[5] Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779 (1905).

Compare Connolly v. Woods, 13 Idaho, 591, 92 Pac. 573 (1907).

put the company outside the general statute. "They say that it is their purpose to construct the railway for their exclusive use. This concession deprives them of the benefits of the statute." But when the matter comes up in another way, when duties not rights are involved, such declarations that the business is private will not prevail if the other evidence is to the contrary. Thus in a recent [1] case where a trucking company which had solicited business by public advertisements sought to show when sued for a loss that they had often refused to serve particular applicants and were therefore not common carriers, the court said sharply: "To claim that one is not a common carrier, because he has persistently disregarded his duty and has arbitrarily chosen whom he would serve notwithstanding that he has invited the public generally to apply is to make a public duty determinable by the pleasure of the individual, and not by principle or law."

**§ 207. Service before business begun.**

While preparations for establishing the service are going on the business should not be regarded as yet upon a public basis. Thus where a railroad is under construction and is not yet publicly opened for passengers, it is not a common carrier of passengers. This is true though persons have occasionally been carried over the road in construction trains at their own solicitation.[2] In McRae

[1] Lloyd v. Haugh & K. Storage & Transfer Co., 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188 (1909).

See also Bare v. American Forwarding Co., 242 Ill. 298, 89 N. E. 1021 (1909).

[2] *United States.*—Shoemaker v. Kingsbury, 12 Wall. 369, 20 L. ed. 432 (1870); Wade v. Lutcher Cypress Lumber Co., 74 Fed. 517, 41 U. S. App. 45, 20 C. C. A. 515, 33 L. R. A. 255 (1896); Albion Lumber Co. v. De Nobra, 72 Fed. 739, 44 U. S. App. 347, 19 C. C. A. 168 (1896).

*Indiana.*—Menaugh v. Bedford Belt Ry. Co., 157 Ind. 20, 60 N. E. 694 (1901); Evansville & R. R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092 (1893).

*Kansas.*—Chicago, K. & W. R. Co. v. Frazer, 55 Kans. 582, 40 Pac. 923 (1895).

v. Canada Pacific Railway,[1] Mr. Justice Johnson charging the jury, said: "A railway which occasionally carries goods or freight in passenger trains is not a common carrier of goods on such trains; and the same rule applies to a railway which occasionally carries passengers in its freight or construction trains, though when persons got on to ride, the defendants did not put them off. If you find the defendants did not solicit passengers, or publicly announce they would be carried, even, if in some or many instances, they have carried passengers for hire at the request and for the special accommodation of applicants, it is clear you have no right to impose upon the defendants the severe obligations which attach to common carriers." Where, however, notwithstanding the road has not been completed the railroad has made a practice of receiving for hire goods and passengers for carriage on its construction trains it will be held to be a common carrier.[2]

**§ 208. Profession made without authority.**

The public profession to carry must be made by the carrier himself, or some one duly authorized by him to do it. A particularly clear case is an early one in the Supreme Court of New York.[3] There the defendant who

*Texas.*—San Antonio & A. P. Ry. v. Robinson, 79 Tex. 608, 15 S. W. 584 (1891).

[1] *Tennessee.*—Nashville, etc., R. R. Co. v. Messino, 1 Sneed, 220 (1853).

*Washington.*—Cogswell v. West St. & N. E. Elec. R. Co., 5 Wash. 46, 31 Pac. 411 (1892);

[1] Mont. L. R. 4 S. Ct. 186 (1888).

[2] *Arkansas.*—Little Rock, M. R. & T. Ry. v. Glidewell, 39 Ark. 487 (1882).

*Georgia.*—Chattanooga R. & C. R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169 (1890).

*Iowa.*—Spence v. Chicago, R. I. & P. Ry. Co., 117 Ia. 1, 90 N. W. 346 (1902).

*Canada.*—Graham v. Toronto, etc., R. Co., 23 U. C. C. P. 541 (1874); Sheerman v. Toronto, etc., Co., 34 U. C. Q. B. 451 (1874).

[3] Satterlee v. Groat, 1 Wend. 272 (1828).

See also:

*Tennessee.*—Jenkins v. Picket, 9 Yerg. 480 (1836).

had abandoned the occupation of a common carrier was engaged by a certain person to bring some goods for him. A servant was sent by the defendant to take the goods, but the goods not being ready the servant against express orders solicited and obtained an order from the plaintiff and then stole some of the goods. It was properly held that the defendant was not liable as common carrier. In a closer case where a person had been accepted as passenger on construction train of an incomplete railroad by the man in charge of the work, the Supreme Court of Indiana well said:[1] "Allen was a superintendent of construction and a civil engineer, and it is not shown that he had authority to receive the appellee as a passenger upon a road that had never been opened to the traveling public. The board of directors and the established rules of the company alone could make the appellant a common carrier for hire and the appellee a passenger. The power was not delegated to Allen, and it was beyond the scope of his authority to convert a construction train into a passenger train. He could not open an imperfect and incomplete road into one for passenger traffic without the consent of his superior officers."

**209. Service undertaken beyond obligation.**

Another point as to the making of the profession should be referred to here although it is more fully discussed later on. There are many instances where service is undertaken not within the general obligation resulting

*Texas.*—Haynie v. Baylor, 18 Tex. 498 (1857).

[1] Evansville & R. R. Co. v. Barnes, 137 Ind. 306 (1893).

In Harvey v. Deep River Logging Co., 49 Oreg. 583, 90 Pac. 501, 2 L. R. A. (N. S.) 131 (1907), it was held that although those in charge of the train of a logging company have no authority but by virtue of their employment alone, to carry passengers on the train, still where for a period of years the manager of a logging company permits the carriage of passengers on its trains, the corporation owes persons so carried the duty of not injuring them by its negligence.

from the usual profession, but by special undertaking in the particular case outside of the usual limitations. The difficult problem in these cases is to determine whether the special acceptance is upon a public basis or upon a private basis, for since it is outside his obligation it is open to the proprietor of the service to extend specially his public profession to the particular case so that the public law will apply it, or to undertake the service within the private law of ordinary contract. For example, a carrier who does not generally undertake service beyond certain limits might in a particular case undertake service beyond these limits. "It has been repeatedly held that while a railroad cannot be compelled to accept and agree to carry goods to points beyond its line, yet it might do so. If the carrier contracts to convey beyond its line it would be liable as a common carrier for the whole distance." [1] This, however, will only be true where the railroad leaves it to be understood that it is acting as a common carrier. It may in unusual circumstances by special acceptance in the particular case exempt itself from the usual liabilities of common carriers.[2]

**§ 210. Service undertaken in unusual manner.**

Another instance of this general problem of particular undertakings outside usual profession may be seen in a recent case dealing with the public liabilities of telephone companies. The usual business of the telephone companies is to put those who wish to converse in communication with each other, the company never accepting a message or delivering it. But it will sometimes be found that the telephone companies have gotten in the way of accepting messages for transmission and delivering them

[1] Farley v. Lavary, 107 Ky. 523, 45 S. W. 840, 47 L. R. A. 383 (1900). See Chapter XV.

[2] See the excellent discussion of this general problem in Santa Fe P. & P. Ry. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910). See Chapter XXII.

to the people to whom they are addressed. Of course if no more can be shown in a particular instance than that employés have undertaken this at the instance of some patrons, the company will not be held responsible in the matter; but sometimes the facts will be stronger, showing that this has been so largely practiced as to hold the telephone companies responsible during its continuance. In the case in mind [1] it was held that although "a telephone company instructed its operator not to receive messages to be by any agent of the company delivered to the sendee, yet if it knowingly permitted its employés, over its wires, to make arrangements for such delivery, and collected from the customer the full charge, including that for delivery, it is liable for the nondelivery, notwithstanding that under its arrangement with its distant operators they were to receive the pay for the delivery." [2]

*Topic B. Implicit Undertaking of Public Employment*

**§ 211. Charter stipulation.**

In the chartering of the early public service companies, as has been seen, the cautious policy was followed of expressly settling in the very charter the public duties of the chartered company; and mandatory provisions of this sort are not unknown at the present day. Such a charter provision expressly requiring public service of the grantee corporation makes a plain case of public obligation by voluntary assumption. The acceptance of such a charter is the voluntary undertaking of the particular corporation by which it is irrevocably bound to perform the service expressly required by the terms of the charter in consideration of the accompanying privileges.[3] This

[1] Cumberland Telephone Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 50 L. R. A. 277 (1900).

[2] See § 765, *infra*.

[3] Of course the grantee in charter offering franchises is only bound upon its acceptance of them. See: *Illinois*.—Chicago Telephone Co.

point is really too plain for argument, and so the Connecticut court regarded it when a railroad attempted to withdraw a service which was plainly enough commanded by its charter: "We hardly know what doubtful principles of law are thought to be involved in this case. The respondents were certainly bound to make their road (if at all) prescribed by their charter, and having made it to put it into use—every material part of it—and keep it in use until discharged by the legislature." [1]

## § 212. Permissive charter.

The beginnings of the modern law of public service are

v. Northwestern Telephone Co., 199 Ill. 324, 65 N. E. 329 (1902).

*New York.*—People v. Albany & Vt. R. R. Co., 24 N. Y. 261, 82 Am. Dec. 295 (1862).

[1] An explicit charter provision requiring service must be obeyed. See:

*United States.*—Union Pacific R. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428 (1875); Atlantic Coast Line Ry. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 51 L. ed. 933 (1906); United States v. Union Pac. Ry. Co., 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. 190 (1895); Talcott v. Pine Grove, 1 Flipp. 120, Fed. Cas. No. 13,735 (1872); Farmers' Loan & Trust Co. v. Henning, 8 Fed. Cas. 4,666 (1878).

*Florida.*—State v. Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225 (1899).

*Illinois.*—People v. St. L., A. & T. H. R. R. Co., 176 Ill. 512, 52 N. E. 292 (1898).

*Indiana.*—Lake Erie, etc., R. R. Co. v. The State ex rel. Mushlitz, 139 Ind. 158, 38 N. E. 596 (1894).

*Iowa.*—The State v. Central Iowa Ry. Co. et al., 71 Iowa, 410, 32 N. W. 409, 60 Am. Rep. 806 (1887).

*Kansas.*—City of Potwin Place v. Topeka Ry. Co., 51 Kans. 609, 33 Pac. 309, 37 Am. St. Rep. 312 (1893).

*Maine.*—Weymouth v. Penobscot Log Driving Co., 71 Me. 29 (1880).

*Massachusetts.*—Brownell v. Old Colony R. R. Co., 164 Mass. 29, 41 N. E. 107, 29 L. R. A. 169, 49 Am. St. Rep. 442 (1895).

*Nebraska.*—State of Nebraska v. Sioux City, etc., R. R. Co., 7 Neb. 357 (1878).

*New Jersey.*—Bridgeton v. Traction Co., 62 N. J. L. 592, 43 Atl. 715 (1898).

*Oklahoma.*—United States v. Choctaw, O. & G. Ry. Co., 3 Okla. 404, 41 Pac. 729 (1895).

*Virginia.*—Southern Ry. Co. v. Franklin, etc., R. R. Co., 96 Va. 693, 32 S. E. 485 (1899).

*England.*—Reg. v. Bristol, etc., Ry. Co., 4 Q. B. 162 (1843).

*New Brunswick.*—Attorney General of New Brunswick, *Ex parte*, 1 Pug. & Bur. 667

to be found in those cases just before the middle of the nineteenth century, in which it was held that although there was no express provision in chartering a supply company compelling it to serve the public, the situation was such that even where its character was permissive, the obligation was assumed. In the leading case of Lumbard v. Stearns,[1] Chief Justice Shaw with characteristic insight held that a water company enjoying privileges under a permissive charter must give public service. "By accepting the act of incorporation," he said, "they undertake to do all the public duties required by it." And indeed it is now well-accepted doctrine that the very acceptance of a charter providing for the carrying on of a business public in character is a sufficient profession in the particular case.[2]

[1] 4 Cush. 61 (1849).

[2] *United States.*—People v. Colorado Central R. R. Co., 42 Fed. 638 (1890); Laighton v. Carthage, 175 Fed. 145 (1909).

*Connecticut.*—State v. Hartford & N. H. R. R. Co., 29 Conn. 538 (1861).

*Georgia.*—Savannah Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43 (1892).

*Kansas.*—Kansas Pac. Ry. Co. v. Nichols & Co., 9 Kans. 235, 12 Am. Rep. 494 (1872).

*Kentucky.*—Board of Trustees of Elizabethtown v. Chesapeake, etc., R. R. Co., 94 Ky. 377, 22 S. W. 609 (1893).

*Minnesota.*—State ex rel. City of St. Paul v. St. Paul City Ry. Co., 78 Minn. 331, 81 N. W. 200 (1899).

*Montana.*—State v. Helena P. & L. Co., 22 Mont. 391, 56 Pac. 685 (1899).

*New York.*—Root v. Great Western R. R. Co., 45 N. Y. 524 (1871).

*Ohio.*—East Ohio Gas Co. v. Akron, 81 Oh. St. 33, 90 N. E. 40 (1909).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

*Pennsylvania.*—Erie & North-East R. R. v. Casey, 26 Pa. St. 287 (1856).

*Tennessee.*—Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897).

*Texas.*—San Antonio St. Ry. Co. v. State, 90 Tex. 520, 39 S. W. 926, 35 L. R. A. 662, 59 Am. St. Rep. 834 (1897).

*Virginia.*—Southern Ry. Co. v. Franklin, etc., R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297 (1899).

*Waskington.*—State v. Spokane St. Ry. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739 (1898).

*Wisconsin.*—State ex rel. v. Frost,

## § 213. Taking out public license.

When it is a question whether a person who is engaged in a business that is public in character [1] has undertaken it upon a public basis, the fact that the proprietor of the enterprise has taken out the license required by public authority of all who are engaged in that business is highly probative. Thus is one case [2] where the evidence was conflicting as to whether the particular carriage was common carriage, the Court of Appeals of Kentucky said: "We are of opinion that by the evidence of appellant himself it is shown that he was a common carrier within the limits of the City of Lexington. He admits that he hauled for all or any persons, and had obtained a license

113 Wis. 623, 88 N. W. 912, 89 N. W. 915 (1902).

It should be added that there are even cases where a company which has undertaken a service upon a public basis has been held to the liabilities of that position although such service is *ultra vires*.

*United States.*—Wade v. Lutcher & Moore Cypress Lumber Co., 74 Fed. 517, 41 U. S. App. 45, 33 L. R. A. 255, 20 C. C. A. 515 (1896).

*Georgia.*—Caldwell v. Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678 (1892).

[1] The mere fact that a license is required for the conduct of a certain business has no conclusive weight in determining the other question as to whether the business is public in character; for although such licensing shows that the business is one over which some degree of State control is necessary, it does not prove that the extreme regulation of the extraordinary law relating to public services is demanded. Thus lawyers, doctors, dentists and druggists cannot usually to-day practice their callings without State license based upon special examinations; nor for that matter can electricians, plumbers, engineers and firemen act as such without a license. And yet although such licensing is proper, the law is plain that these callings are not public services in consequence. See Hurley v. Eddingfield, 156 Ind. 416, 59 N. E. 1058, 53 L. R. A. 135, 83 Am. St. Rep. 198 (1901).

[2] Farley v. Lavary, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383 (1900).

See also:

*Alabama.*—Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695 (1842).

*Illinois.*—Hastings Express Co. v. Chicago, 135 Ill. App. 268 (1907).

*Indiana.*—Fargo v. Ledger Standard Co., 59 Ind. 496 (1877).

*New Jersey.*—Atlantic City v. Fonsler, 70 N. J. L. 125, 56 Atl. 119 (1903).

*New York.*—Robinson v. Cornish, 13 N. Y. Supp. 577 (1890).

so to do." But a failure to take out a license although such license is required of those who are engaged in the employment in question, is not conclusive against public employment if public profession is otherwise evidenced by usual conduct. As was said in such a case by a California court:[1] "It was proven, that defendants held themselves out as public ferrymen, and were accustomed to convey persons and property across the straits, for hire; and, so far as the rights of plaintiffs were concerned, it was immaterial whether or not they were duly authorized to run such a ferry. If they were assuming to act as ferrymen, without license, they could not take advantage of their own wrong to avoid the responsibility which attached to their calling." [2]

### § 214. Exercise of eminent domain.

A factor which if present is always seized upon first to show that the service in question is necessarily conducted upon a public basis, is the exercise of the right of eminent domain by the proprietors of the enterprise. This has always been considered as conclusive evidence of irrevocable profession of public employment in the ab-

[1] Polk v. Coffin, 9 Cal. 56 (1858).

Thus the failure of an innkeeper to procure a license as required by law, does not prevent him from being held liable as an innkeeper.

*Alabama.*—Lanier v. Youngblood, 73 Ala. 587 (1883).

*Iowa.*—Lyon v. Smith, Morris, 184 (1843).

*Maine.*—Norcross v. Norcross, 53 Me. 163 (1865); Atwater v. Sawyer, 76 Me. 539, 49 Am. Rep. 634 (1884).

*North Carolina.*—State v. Wynne, 1 Hawks, 451 (1821).

*Tennessee.*—Dickerson v. Rogers, 4 Humph. 179, 40 Am. Dec. 642 (1843).

[2] Even as to those callings which may be public in character, a license is sometimes required of those who are carrying on that business upon a private basis; so that merely taking out a license even in such businesses is not conclusive evidence of public employment. See:

*Minnesota.*—State ex rel. v. W. W. Cargill Co., 77 Minn. 223, 79 N. W. 962 (1899).

*New Jersey.*—Atlantic City v. Dehn, 69 N. J. L. 233, 54 Atl. 220 (1903).

sence of an express disclaimer at the time of acceptance.[1] It is difficult to select one quotation to this effect from the almost innumerable decisions in which this point is made; but in one New Jersey case it is put most succinctly: "The fact that the legislature has granted the right to take private property clearly evinced the legislative intent to lay such companies under obligations to the public to permit the use of their lines by all persons under reasonable regulations; and, in accepting the benefits of this law, the recipient of them assumes the performance of this duty to the public." [2]

[1] An express disclaimer, when claiming the right of eminent domain, of all intention to serve the public, would, of course, show that the company could not legally exercise that right. See Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932, 1 L. R. A. 969, 111 Am. St. Rep. 779 (1905), discussed in § 206, *supra*.

[2] Quoted from State ex rel. v. American & E. News Co., 43 N. J. L. 381.

The following cases in which the language is to the same effect, are selected almost at random:

*United States.*—Chicago, etc., R. R. Co. v. Ackley, 94 U. S. 179, 24 L. ed. 99 (1876).

*Georgia.*—Caldwell v. Richmond, etc., R. R. Co., 89 Ga. 550, 15 S. E. 678 (1892).

*Indiana.*—Cincinnati, I. & W. Ry. Co. v. City of Connersville, 170 Ind. 316, 83 N. E. 503 (1908); State ex rel. v. Consumers' Gas Co., 157 Ind. 345, 61 N. E. 674 (1901).

*Iowa.*—Jones & Price v. The Mahaska County Coal Co., 47 Iowa, 35 (1877).

*Kentucky.*—Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983 (1897).

*Maine.*—New England Express Co. v. Maine Central R. R. Co., 57 Me. 188, 2 Am. Rep. 31 (1869).

*Montana.*—State v. Butte Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574 (1896).

*Nebraska.*—State v. Missouri Pac. Ry. Co., 81 Neb. 174, 115 N. W. 757 (1908).

*Nevada.*—Gibson v. Mason, 5 Nev. 283 (1869).

*New Jersey.*—Rogers Locomotive & M. Works v. Erie Ry. Co., 20 N. J. Eq. 379 (1869).

*New York.*—Armour Packing Co. v. Edison Electric Illuminating Co., 115 N. Y. App. Div. 51, 100 N. Y. Supp. 605 (1906).

*North Carolina.*—Green v. Telegraph Co., 136 N. C. 489, 49 S. E. 165 (1904).

*Ohio.*—Cincinnati, H. & D. R. R. Co. v. Village of Bowling Green, 57 Oh. St. 336, 49 N. E. 121 (1897).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

**§ 215. Acceptance of municipal franchises.**

The household service which constitutes the characteristic type of modern employments which are public in character cannot be carried on without local franchises, as the use of the streets is almost always indispensable. Since this is true of surface railroads and other methods of urban transportation, of gas supply and electricity, of water and sewerage, the argument has often been made that the public character of these services is the result of the municipal franchises which they have received for the use of the public streets. But as has been seen earlier, this view of the matter mistakes consequence for cause; since, unless these services were public in character, these franchises could not be constitutionally granted. And yet there is a certain truth in these statements, for granted that the service is of public necessity, the acceptance of such a franchise is certainly almost conclusive evidence of public profession, and the language referred to is usually consistent with this explanation. As was well said by the Supreme Court of Indiana [1] in one of the many cases dealing with gas supply: "These rights which evoke an element of sovereignty and which can only exist by grant from the public rest upon the principle that their existence will bestow a benefit upon that part of the public in whose behalf the grant is made and the benefit received by the citizen is adequate consideration for the right of convenience surrendered by him; the grant thus resting upon a public and reciprocal arrangement imposes upon the appellee a legal obligation to serve all the members of the public contributing to its asserted right impartially." [2]

*Tennessee.*—Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897).

[1] State v. Consumers' Gas Co., 157 Ind. 345, 61 N. E. 674 (1901).

[2] From the almost innumerable cases in which this point has been made the following rather wide selection has been made:

*Florida.*—City of Tampa v.

**§ 216. Entering into municipal contract.**

The obligations of public service consequent upon the acceptance of a municipal franchise are more plain of course where the service company in obtaining its privileges is obliged to enter into a formal contract with the governmental body unequivocally undertaking general service for all who apply upon the favorable conditions therein promised. Nevertheless, it is somewhat difficult to explain how the private citizen gains individual rights under such a contract. Various theories have been advanced to give citizens individually the right to enforce the contract. None of these, as will be seen, really explain the situation. The truth of this matter, as is pointed out in a late case,[1] is probably, that the entering into this

Tampa Water Works Co., 45 Fla. 600, 34 So. 631 (1903).

*Georgia.*—Freeman v. Macon Gaslight & Water Co., 126 Ga. 843, 56 S. E. 61 (1906).

*Indiana.*—State ex rel. v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674 (1901).

*Kentucky.*—Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983 (1897).

*Maine.*—Brunswick Gas Light Co. v. United Gas, Fuel & Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385 (1893).

*Michigan.*—Mahan v. Michigan Telephone Co., 132 Mich. 242, 93 N. W. 629 (1903).

*Missouri.*—State ex rel. v. Joplin Water Works, 52 Mo. App. 312 (1893).

*Montana.*—State v. Butte Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. R. 574 (1896).

*Nebraska.*—American Water Works v. Nebraska, 46 Neb. 194, 64 N. W. 711, 50 Am. St. Rep. 610 (1895).

*New York.*—Armour Packing Co. v. Edison Electric Illuminating Co., 115 N. Y. App. Div. 51, 100 N. Y. Supp. 605 (1906).

*Ohio.*—Cincinnati, etc., R. R. Co. v. Village of Bowling Green, 57 Ohio St. 336, 49 N. E. 121 (1897).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

*Tennessee.*—Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897).

*Washington.*—State v. Spokane St. Ry. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739 (1898).

*Wisconsin.*—City of Madison v. Madison Gas & Electric Co., 129 Wis. 249, 108 N. W. 65 (1906).

[1] The quotation which follows is from the opinion of Evans, J., in Freeman v. Macon Gaslight & Water Co., 126 Ga. 843, 56 S. E. 61 (1906).

formal contract with the governmental authorities is a plain commitment to public service. "The water company by entering into the contract which the General Assembly authorized the city to make with that company, accepted the privilege of supplying the citizens of that city, as such, upon certain terms, and became a public service corporation with an express statutory duty to perform. This duty the company owed to every private consumer of water, independently of any contract duty it owed the municipality itself, considered as a municipal corporation engaged in the discharge of governmental functions." [1]

**§ 217. Aid from taxation.**

Especially is this assumption of profession to serve the public justifiable in the case of the proprietor of any business public in character who accepts aid from the public treasury, directly or indirectly, by grant or guaranty. As public funds under our constitutional law can only be used for a public purpose, it should always be assumed that, in taking such aid, the recipient is not participating in any illegality. On the other hand, that public grants may be made to private corporations which

[1] The following cases also consider a municipal contract as conclusive evidence of public obligation:

*United States.*—Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 43 L. ed. 886, 20 Sup. Ct. 736 (1900).

*Alabama.*—Smith v. Birmingham Water Co., 104 Ala. 315, 16 So. 123 (1893).

*Michigan.*—Mâhan & Michigan Telephone Co., 132 Mich. 242, 93 N. W. 629 (1903).

*Missouri.*—State ex rel. City of St. Louis v. Laclede Gaslight Co., 102 Mo. 472, 14 S. W. 974, 15 S. W. 383 (1890).

*Montana.*—State v. Butte Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574 (1896).

*New Jersey.*—Mayor of Boonton v. Boonton Water Co. (N. J.), 61 Atl. 390 (1904).

*Pennsylvania.*—School District v. Enterprise Nat. Gas Co., 18 Pa. Sup. Ct. 73 (1901).

*Tennessee.*—Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897).

have openly undertaken public service is well established. "That a railroad is a work in which the public are interested to the extent that a tax imposed in aid of it must be upheld, is a proposition upon which there is no diversity of authority whatever." [1] And when a railway enjoys the privilege of having its property exempt from the general burden of taxation, there cannot be a clearer case of private property devoted for a valuable consideration to public use; and consequently subject to public regulation.[2]

**§ 218. Governmental participation.**

One other situation at least justifies the natural inference that the business undertaken is upon a public basis. Where the State itself participates in the enterprise whether in the ownership of the property merely or in the conduct of the enterprise it must again be true that service is to be rendered to the public indiscriminately or else participation of the State will be unjustifiable. As was said by the judges of the Massachusetts Supreme Judicial Court in advising the legislature that municipalities might constitutionally be given the power to engage in the production and sale of gas and electricity: "In general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with with-

[1] See Gibson v. Mason, 5 Nev. 283 (1869), citing among others, the following cases:

*Connecticut.*—City of Bridgeport v. Housatonic R. R. Co., 15 Conn. 475 (1843).

*Indiana.*—City of Aurora v. West, 9 Ind. 74 (1857).

*Kentucky.*—Talbot v. Dent, 9 B. Mon. 526 (1849).

*New York.*—Buffalo & New York R. R. v. Brainard, 9 N. Y. 100 (1853).

*Ohio.*—Cincinnati, etc., R. R. Co. v. Commissioners of Clinton County, 1 Oh. St. 77 (1852).

[2] The leading case is probably township of Pine Grove v. Talcott, 19 Wall. 666, 22 L. ed. 227 (1873), where bonds issued to aid in the construction of a railroad were held valid, the court saying: "Though the corporation was private its work was public, as much so as if it were constructed by the State."

out the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them." [1] The justification for the devotion of funds raised from taxation to the conduct of these businesses is that the public may demand service under limitations set by law. Notwithstanding occasional attempts by municipal authorities to escape from their public duties it is recognized in all the cases that when a business of this sort is carried on by governmental bodies they are necessarily subjected to the whole law governing public service by private corporations. The entrance of a public body into these businesses is therefore a plain announcement that it is prepared to serve all upon proper conditions.[2]

[1] Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487 (1890).

This represents the rule now generally accepted that governmental bodies may be constitutionally empowered to participate in, or take control of, the ownership or management of public services. See for examples of this:

*United States.*—Thompson-Houston Electric Co. v. Newton, 42 Fed. 723 (1890), (electric supply).

*Indiana.*—Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214 (1891).

*Michigan.*—Mitchell v. Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468 (1897), (electric supply).

*Ohio.*—State v. Toledo, 48 Oh. St. 112, 26 N. E. 1061 (1891), (gas supply).

*Pennsylvania.*—Linn v. Chambersburg Borough, 160 Pa. St. 511, 28 Atl. 842 (1894), (electric supply).

*Tennessee.*—Smith v. Nashville, 88 Tenn. 464, 12 S. W. 924 (1890), (water supply).

But see: Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291 (1889).

[2] See these prominent cases supporting the text:

*Alabama.*—Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 So. 445 (1900).

*New York.*—Silkman v. Water Commissioners, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827 (1897).

# CHAPTER VII

## IMPLIED PROFESSION OF PUBLIC EMPLOYMENT

§ 220. Conduct evidencing public employment.

*Topic A. Public Employments and Private Enterprises*

§ 221. Potential use by the public.
222. Public access held indispensable.
223. Industrial railroads.
224. Lateral branches.
225. Public spur.
226. Private siding.

*Topic B. Characteristics of Public Business*

§ 227. Public service in regular course.
228. Public employment—carter.
229. Regular service—shipmaster.
230. Established charge—expressmen.
231. Indiscriminate service—irrigation.
232. Public profession—warehousing.

*Topic C. Characteristics of Private Business*

§ 233. Private contract as the basis.
234. Occasional business—householders.
235. Casual employment—shipowners.
236. Intermittent employment—teamsters.
237. Limited undertaking—ferries.
238. Incidental service—merchants.

*Topic D. Particular Illustrations of the Distinction*

§ 239. Public and private carriers in general.
240. Public inn and private house.
241. Public and private highways of every sort.
242. Public and private waterworks.
243. Public and private gas and electricity.
244. Public and private telephone and telegraph.

### § 220. Conduct evidencing public employment.

That public profession in last analysis is always a

question of fact, although governed by principles of law, must now be obvious. When there is an express declaration, or such undertaking as is equivalent to it, that question, as has just been seen, is comparatively simple. But the undertaking to serve the public may be evidenced by conduct as well as declaration; and this will often be a very puzzling problem of the preponderance of evidence, which may establish a case of public profession, notwithstanding certain facts usually showing private employment. Probably the best that can be done in this chapter with a subject of such importance is to collect the principal cases distinguishing public profession and private undertaking, and point out what situations are characteristic of each type. It should be said at the outset, however, that it is always a question upon the whole proof in the particular case whether the proprietors of the business have done enough to give people generally the impression that they are at the disposal of the public. Thus an innkeeper who declared that her house was not a public one was refuted by her own admission that she took in almost everybody who would pay her prices.[1] So a carrier did not escape the liability of an insurer by showing that he often refused people whom he did not think it advantageous to serve, as this would simply show that he had sometimes failed to fulfill his obligations.[2]

*Topic A. Public Employments and Private Enterprises*

**§ 221. Potential use by the public.**

Public service is the fundamental thing; but wherever there is the real possibility of use as a matter of right by all within the sphere of the service, the mere fact that the service will in all probability be available to a lim-

[1] Jaquet v. Edwards, 1 Jamaica, 4 (1867).

[2] Lloyd v. Haugh & K. Storage & Tr. Co., 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188 (1909).

ited number of persons should not be sufficient to prevent it from being considered as sufficiently public. As the New York court [1] put it, in holding public a waterworks serving a few persons: "Public use may be limited to the inhabitants of a small or restricted locality, but the use must be in common and not for a particular individual." There is, however, a California irrigation case which held that the mere possibility of public use to a limited neighborhood is too illusory to justify the grant of special privileges.[2] There is also a case in Maine which held hydro-electric power development not a public service because after the water power was exhausted no more of the public could be supplied.[3] And in a recent Minnesota case [4] although the distribution of electrical power was said to be sufficiently general to be public in character it was held that the sale of water power direct from the wheels to adjoining factories was not. "A public use," said the court, "does not require that the property be capable of being used by the entire public, or any portion thereof; but a use which by physical conditions is restricted to a very few persons who must use it within a very restricted area, is not a public use."

**§ 222. Public access held indispensable.**

It seems to be established that public access to the

[1] Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246 (1891). But most courts hold indiscriminate water supply public in character. See citations in § 92, *supra*.

[2] Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537 (1892). Irrigation on a public basis is public in character even if there be few takers. See § 93, *supra*.

[3] Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472 (1905). By the great weight of authority hydro-electric power development is a public service. See § 114, *supra*.

[4] Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638 (1906). Whether the direct sale of water power is public in character is doubtful as the authorities. See § 95, *supra*.

service offered is indispensable. This is well illustrated by a peculiar case in New York [1] where both ends of a cable tramway were upon the private land of its proprietors; and in view of that fact alone, the Court of Appeals held that it was necessarily a private enterprise. "A contemplated possible limited use by a few, and then not as a right, but by way of permission or favor, is not a public use." Another case [2] outside the beaten track is that of a certain lumber skid-road for which, it was held, eminent domain could not be granted, as both termini of the proposed road were entirely surrounded by the property of the proprietors so that the public had no access thereto. On the other hand, if a special railway is being built to serve particular mines it will be public in character if the owners of other properties through which it passes are to be free to use it. As the Superior Court of New Jersey [3] well said of such a railway: "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send materials, implements or machinery for mining purposes into, or to obtain ores from the several mining tracts adjacent to the location of this road may use this railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public." There are other cases of industrial development to the same effect—mining tunnels,

[1] Matter of Split Rock Cable Rd., 128 N. Y. 408, 28 N. E. 506 (1891). See also Re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429 (1888).

[2] Apex Transportation Co. v. Garbade, 32 Oreg. 582, 52 Pac. 573, 54 Pac. 367, 882 (1898). But see Bridal Veil Lumbering Co. v. Johnson, 30 Oreg. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818 (1896).

[3] De Camp v. Hibernia R. R. Co., 47 N. J. L. 43 (1885).

for example [1]—which have been held to be public in character.

### § 223. Industrial railroads.

Of course railroad operation is, generally speaking, common carriage as appears in countless cases. But private railways are not unknown; and it is often difficult to determine whether a certain railway is public or private. The difficult case is that of a railway constructed largely in the interest of the owners of a particular industrial enterprise to give them necessary service. Even such a railway may be a public one, as a Minnesota case holds. "If all the people have the right to use the road it is a public use or interest although the number who have business requiring its use may be small." [2] On the other

[1] In accord with the text are the following cases among others:

*United States.*—Baillie v. Larson, 138 Fed. 177 (1905).

*Colorado.*—Tanner v. Tr. Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 464 (1906).

[2] Quoted from Kettle River R. R. Co. v. Eastern Ry. Co., 41 Minn. 461, 43 N. W. 469, 6 L. R. L. 111 (1889).

Other important cases to the same effect are:

*Georgia.*—Butler v. Tifton Ry. Co., 121 Ga. 817, 49 S. E. 763 (1904).

*Iowa.*—Phillips v. Watson, 63 Ia. 28, 18 N. W. 659 (1884).

*Kentucky.*—Louisville, etc., R. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447 (1901).

*Maine.*—Ulmer v. Lime Rock R. R. Co., 98 Me. 579, 57 Atl. 100, 66 L. R. A. 387 (1904).

*Maryland.*—New Central Coal Co. v. George's Creek C. & I. Co., 37 Md. 537 (1872).

*Missouri.*—Dietrich v. Murdock, 42 Mo. 279 (1868).

*Montana.*—Butte, A. & P. Ry. Co. v. Montana Union Ry. Co., 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508 (1895).

*Oregon.*—Bridal Veil Lumbering Co. v. Johnson, 30 Oreg. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818 (1896).

*Wisconsin.*—Maginnis v. Knickerbocker Ice Co., 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833 (1901).

A private lumber railway by running a motor car for passenger service does not become a common carrier of freight. Edgar Lumber Co. v. Cornie Stave Co. (Ark.), 130 S. W. 452 (1910).

hand, a railroad constructed and used merely in connection with the conduct of a private business is not a common carrier. So, where a railroad is built to haul logs from the forests to the sawmill of the owner, it is not a common carrier. It cannot be seriously contended, said the Circuit Court of Appeals, that an article of the State Constitution which dealt with corporations of public improvement and utility,[1] "was intended to, or could be so construed as to make out, of a logging railroad appurtenant to a sawmill, constructed wholly on private grounds, and operated for a private purpose, a common carrier charged with all the duties and responsibilities incumbent by the laws of the land upon common carriers, and simply because it is a railroad and the owners are incorporated as a business corporation. It seems to us, we might as well hold that a railroad on a sugar plantation appurtenant to the sugar mill and used for carrying cane thereto, should be declared a common carrier."

[1] Quoted from Wade v. Lutcher & Moore Lumber Co., 74 Fed. 517, 20 C. C. A. 515, 33 L. R. A. 255 (1896).

Other important cases to the same effect are:

*United States.*—Weidenfeld v. Sugar Run Ry., 48 Fed. 615 (1892); Albion Lumber Co. v. De Nobra, 72 Fed. 739, 19 C. C. A. 168 (1896).

*California.*—Contra, Costa R. R. Co. v. Moss, 23 Cal. 323 (1863).

*Georgia.*—White v. Kennon & Co., 83 Ga. 343, 9 S. E. 1082 (1889); Normandale Lumber Co. v. Knight, 89 Ga. 111, 14 S. E. 882 (1892).

*Illinois.*—Litchfield & M. Ry. Co. v. The People, 222 Ill. 242, 78 N. E. 589 (1906).

*Louisiana.*—Williams et al. v. Judge, 45 La. Ann. 1295, 14 So. 57 (1893).

*North Carolina.*—Leigh v. Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632 (1903); Cozard v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779 (1905).

It is perhaps not quite accurate to divide the cases as they are between the two notes above. Some few of them hold that although never committed to full service as passenger carriers, such industrial railways may become by long continued action, if acquiesced in by their proprietors, liable for not using what care it was fair for a passenger to expect under the circumstances.

*Minnesota.*—Campbell v. Duluth & Northeastern R. R. Co., 107 Minn. 358, 120 N. W. 375 (1909).

*Oregon.*—Harvey v. Deep River Logging Co., 49 Oreg. 583, 90 Pac. 501, 12 L. R. A. (N. S.) 131 (1907).

## § 224. Lateral branches.

When a public railroad builds a branch line from its road, primarily to accommodate some individual business, it is nevertheless a common carrier over the branch, and the use of the track is open to all who have occasion to use it as well as to the particular individual for whose benefit it was built.[1] The general question is perhaps more often raised by a petition to take land for this purpose by eminent domain. This is universally decided to be permissible, for the operation of such a branch is a public use. As the court said in one of these cases, Chicago & Northwestern Railway v. Morehouse,[2] "The tak-

[1] *United States.*—Interstate Commerce Commission v. Delaware, L. & W. R. R. Co., 216 U. S. 531, 30 Sup. Ct. 415 (1910).

*Alabama.*—Agee & Co. v. Louisville & N. R. Co., 142 Ala. 344, 37 So. 680 (1904).

*Georgia.*—Butler v. Tifton, T. & G. R. R., 121 Ga. 817, 49 S. E. 763 (1904).

*Illinois.*—Chicago & A. R. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824 (1889).

*Kentucky.*—Louisville, etc., R. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601 (1901); Bedford-Bowling Green Co. v. Oman, 115 Ky. 369, 73 S. W. 1039 (1903).

*Louisiana.*—Kansas City S. & G. Ry. Co. v. Louisiana, etc., R. Co., 116 La. 178, 40 So. 627, 5 L. R. A. (N. S.) 512 (1905).

*Minnesota.*—State ex rel. R. & W. Com. v. Willmar & S. F. R. Ry. Co., 88 Minn. 448, 93 N. W. 112 (1903).

*Nebraska.*—Roby v. State ex rel. Farmers' G. & L. S. Co., 76 Neb. 450, 107 N. W. 766 (1906).

*New York.*—Kellogg v. Sowerby, 87 N. Y. Supp. 412, 93 App. Div. 124 (1904).

*South Carolina.*—Avinger v. South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716 (1888).

*Texas.*—Railroad Comm'rs v. St. Louis & S. W. Ry. (Tex.), 80 S. W. 102 (1904). Compare Kyle v. Texas & N. O. R. R. (Tex. Civ. App.), 4 L. R. A. 275 (1889).

[2] 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918 (1901).

To the same effect are:

*Arkansas.*—St. Louis, I. M. & S. Ry. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434 (1893).

*Maine.*—Ulmer v. Lime Rock R. R., 98 Me. 579, 57 Atl. 1001 (1904).

*Michigan.*—Toledo S. & M. R. R. v. East S. & S. C. R. R., 72 Mich. 206, 40 N. W. 436 (1888).

*Montana.*—Butte A. & P. Ry. v. Montana U. Ry., 16 Mont. 504, 41

ing of land for a spur track to connect with a single industry is a taking for public use, if the purpose of the company is to maintain and operate such track as an integral part of its railway system, so as to serve all who may desire it, and all can demand, as a right, to be served without discrimination."

**§ 225. Public spur.**

The distinction between a public spur and a private siding necessarily involves similar considerations. If the track runs for any considerable distance so that by possibility the road may be of use to several persons, its construction is a public purpose, even though the immediate use of the spur is to be made by one concern which is the moving party in its construction. As the court said in one leading case in Illinois: [1] "We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as materially affecting them and giving a private character to their use. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to public control to the extent that railroad tracks generally are, they are tracks for public use." It may be in such cases that it is expected or even that it is intended that such tracks will be used almost entirely by the manufacturing establishment, yet if there is no exclusion of the equal rights of use by others, and this singleness of use is simply the result of

Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508 (1895).

*New Jersey.*—De Camp v. Hibernia R. R., 47 N. J. L. 43 (1885).

*Oregon.*—Bridal Veil Lumbering Co. v. Johnson, 30 Oreg. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818 (1896).

[1] Chicago Dock, etc., Co. v. Garrity, 115 Ill. 155, 3 N. E. 448 (1885).

location and convenience of access, it cannot affect the question.[1]

## § 226. Private siding.

On the other hand, a private siding leading merely from private property to the line of a public railroad over which the public can have no rights is not a public utility. This is plainly true where the premises of the individual benefited either directly adjoin the railroad or are separated only by a few feet, so that the intervening land can be accommodated from the main track. Thus in another Illinois case [2] where it appeared that a coal company desired to condemn by right of eminent domain a strip of private land in order to connect its private tramway with a railroad the court held that this could

[1] In the following cases a railroad spur was held to be public in character although constructed primarily for the benefit of particular concerns:

*Alabama.*—Agee & Co. v. Louisville & N. R. Co., 142 Ala. 344, 37 So. 680 (1904).

*Georgia.*—Jones & Co. v. Venable, 120 Ga. 1, 47 S. E. 549 (1904).

*Iowa.*—Morrison v. Thistle Coal Co., 119 Iowa, 705, 94 N. W. 507 (1903).

*Kentucky.*—Straight Creek Coal Mining Co. v. Straight Creek Coal & C. Co. (Ky.), 122 S. W. 842 (1909).

*Louisiana.*—Kansas City, S. & G. Ry. Co. v. Louisiana W. Ry. Co., 116 La. 178, 40 So. 627, 5 L. R. A. (N. S.) 512 (1905).

*Maine.*—Ulmer v. Lime Rock Ry., 98 Me. 579, 57 Atl. 1001 (1904).

*Maryland.*—Dulaney v. United Ry. & Electric Co., 104 Md. 423, 65 Atl. 45 (1906).

*Michigan.*—Toledo, S. & M. R. R. v. East Saginaw, etc., R. R. Co., 72 Mich. 206, 40 N. W. 436 (1888).

*Minnesota.*—Chicago, B. & N. R. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75 (1890).

*Missouri.*—Brown v. Chicago G. W. Ry. Co., 137 Mo. 529, 38 S. W. 1099 (1897).

*Montana.*—Butte, A. & P. Ry. Co. v. Montana Union Ry. Co., 16 Mont. 504, 41 Pac. 232, 50 Am. St. Rep. 508, 31 L. R. A. 298 (1895).

*New York.*—Clarke v. Blackmar, 47 N. Y. 150 (1871).

*Pennsylvania.*—Hays v. Risher, 32 Pa. St. 169 (1858).

*South Carolina.*—Avinger v. South Carolina Ry. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716 (1888).

*Virginia.*—Zircle v. Southern Ry. Co., 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805 (1903).

[2] Sholl v. German Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379 (1887).

not be done. "It is clear that the use for which the lands proposed to be taken in this case is not a public one. The coal, the coal works and the present tramway are in the strictest sense private property, and the public generally have no more interest in them or in the operation of the works including the tramway than they have in any other strictly private business. The same would be equally true after the proposed extension of the tramway. The extending of it to the railroad would not change its character or the obligations of the company or the public in the slightest degree. Without the consent of the owners of it, there is not a person in the State, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight." [1]

*Topic B. Characteristics of Public Business*

**§ 227. Public service in regular course.**

The fundamental characteristic of a public calling is

[1] In the following cases the construction of such sidings were held to be a private purpose:

*United States.*—Chattanooga Terminal Ry. v. Felton, 69 Fed. 273 (1895).

*Arkansas.*—Edgar Lumber Co. v. Cornie Stave Co. (Ark.), 130 S. W. 452 (1910).

*Illinois.*—Koelle v. Knecht, 99 Ill. 396 (1881).

*Maine.*—Green v. Portland, 32 Me. 431 (1851).

*Minnesota.*—Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565 (1894).

*Missouri.*—Glaessner v. Anheuser Busch Brewing Assn., 100 Mo. 508, 13 S. W. 707 (1890); Knapp, Stout & Co. v. Transfer Co., 126 Mo. 26, 28 S. W. 627 (1894); Sherlock v. K. C. Belt Ry. Co., 142 Mo. 172, 43 S. W. 629 (1897).

*Pennsylvania.*—Rochester & P. C. & I. Co. v. Berwind-White C. M. Co., 24 Pa. Co. Ct. 104 (1900); Robbins v. Western Washington R. R. Co., 31 Pitts. L. J. (N. S.) 181 (1900).

*Utah.*—Cereghino v. Oregon S. L. Ry. Co., 26 Utah, 467, 73 Pac. 634, 99 Am. St. Rep. 843 (1903).

*Washington.*—Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362 (1902).

*West Virginia.*—Pittsburgh W. & K. R. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680 (1888).

indiscriminate dealing with the general public. As Baron Alderson said in the leading case: "Everybody who undertakes to carry for anyone who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract." [1] This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. "One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier." [2]

**§ 228. Public employment—carter.**

It sometimes happens, especially in a new country, that a farmer or other person who is driving a wagon to town on his own business may agree to carry goods for his neighbors for hire. Where he consents to carry for all persons indifferently, the prevailing view is that he becomes a common carrier, at least as to the particular trip in connection with which he makes the offer, though he might not be compelled to undertake the duty on any other occasion. In the earliest case [3] the plaintiff claimed ex-

[1] Quoted from Ingate v. Christie, 3 Car. & K. 61 (1850). See definitions in cases cited under § 160, *supra*.

[2] Quoted from Hahl v. Laux (Tex. Civ. App.), 93 S. W. 1080 (1906). See definitions in cases cited in § 238, *infra*.

[3] Gisborn v. Hurst, 1 Salk. 249 (1710).

See also:

*Kentucky.*—Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466 (1834).

*Mississippi.*—Harrison v. Roy, 39 Miss. 396 (1860).

*Pennsylvania.*—Gordon v. Hutchinson, 1 W. & S. 285, 37 Am. Dec. 464 (1841).

*Tennessee.*—Moss v. Bettis, 4 Heisk. 661, 13 Am. Rep. 1 (1871).

emption from distress upon his goods upon the ground that they were in the possession of a common carrier. The plaintiff had delivered them in London to one Richardson to carry, who was not a regular carrier, but for some small time last past, brought cheese to London and in his return took such goods as he could carry back in his wagon into the country for a reasonable price and the goods were distrained in his possession by his landlord. The court held the goods exempt, for the reason that "any man undertaking for hire to carry the goods of all persons indifferently, as in this case, is, as to this privilege, a common carrier." But in at least one case [1] it has been held that in such a case the farmer is not a common carrier, nor, the court added, would it "make any difference how many applications of this kind had been made by the party thus carrying, or to how many different persons they may have been made, they would still remain so many special and individual transactions." The view usually taken, however, is that the farmer under such circumstances is a common carrier in spite of the fact that the occupation is merely incidental, provided the carriage is really a business with him.

**§ 229. Regular service—shipmaster.**

It has already been seen that the transportation by water of passengers or goods, or both, is public in character. Ships, steamboats, river craft and canal boats, even lighters and barges,—it makes no difference what sort of vessel may be used in conducting the transpor-

*Texas.*—Hahl v. Laux (Tex. Civ. App.), 93 S. W. 1080 (1906).

[1] Samms v. Stewart, 20 Ohio, *69, 55 Am. Dec. 445 (1851).

See also:

*Delaware.*—Pennewill v. Cullen, 5 Harr. 238 (1849).

*New York.*—Fish v. Clark, 49 N. Y. 122 (1872).

*Texas.*—Haynie v. Baylor, 18 Tex. 498 (question for jury), (1857).

*England.*—Brind v. Dale, 8 C. & P. 207 (1837).

tation, it will be a case of common carriage if there is sufficient evidence of the general undertaking to serve the public indifferently.[1] The clearest proof of this public profession is regular service. A vessel plying regularly between two ports is almost certainly engaged in general service; and the proprietors conducting the business are almost always held liable as common carriers. This was said most positively in the latest case[2] involving steamship service, "It was admitted in the answer of the defendant that it was a common carrier by sea, operating a certain number of vessels between the port of Savannah, Georgia, and the ports of Boston, Massachusetts, and New York city, and accustomed to carry the particular commodity offered it by the plaintiff, and against which it is alleged to have discriminated. From the earliest times it has been considered that a common carrier exercises a public employment, with public duties to perform. He cannot, like a merchant receive or reject a customer at pleasure. He is bound to serve the public indifferently and this duty with respect to the commonness of service was regarded as the distinguishing trait of a common carrier."

[1] See particularly:

*United States.*—Liverpool & G. W. Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 32 L. ed. 788 (1889); The Huntress, 2 Ware, 89 (1840).

*Connecticut.*—Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745 (1838).

*Florida.*—Bennett v. Filyaw, 1 Fla. 403 (1847).

*Georgia.*—Brown v. Clayton, 12 Ga. 564 (1853).

*New Jersey.*—Mersbon v. Hobensack, 22 N. J. L. 372 (1850).

*New York.*—Elliott v. Rossell, 10 Johns. 1, 6 Am. Dec. 306 (1813).

*South Carolina.*—Swindler v. Hilliard, 2 Rich. L. 286, 45 Am. Dec. 732 (1846).

*Tennessee.* — Porterfield v. Humphreys, 8 Humph. 497 (1847).

*Vermont.*—Spencer v. Daggett, 2 Vt. 92 (1829).

*England.*—Richardson v. Sewell, 2 Smith, 205 (1805).

[2] Ocean S. S. Co. v. Savannah L. W. & S. Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867 (1909). See also Bassett & S. v. Aberdeen Coal & M. Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. L. Rep. 1122 (1905).

**§ 230. Established charge—expressmen.**

The establishment by a carrier of a regular tariff charge for the carriage of a certain article is also evidence that the carrier is a common carrier of that article. So where an express company received a dog to be shipped to a certain place for three dollars, which was found to be the regular charge, the court remarked that the fact that the company had established regular charges for such freight, tends to show that they were in the transportation business.[1] The case of the city truckmen is made difficult by the usual absence of this circumstance. Some cases hold that they are not common carriers, the chief reason being that such truckmen do not carry goods without special agreement as to terms of carriage.[2] Other authorities, however,[3] hold that the truckman who holds himself out as a public truckman is a common carrier, recognizing that it is impossible for him to fix in advance a tariff of charges for all services that may be asked of

[1] Southern Express Co. v. Ashford, 126 Ala. 591, 28 So. 732 (1899).

This point is emphasized also in Santa Fe P. & P. Ry. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910).

[2] *Missouri.*—Jaminet v. American S. & M. Co., 109 Mo. App. 257, 84 S. W. 128 (1904).

*New Hampshire.*—Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431 (1895).

*South Carolina.*—Piedmont Mfg. Co. v. Columbia & G. R. R. Co., 19 S. C. 353 (1882).

*England.*—Scarfe v. Farrant, L. R. 10 Exch. 358 (1875).

[3] *Kentucky.*—Cayo v. Pool, 108 Ky. 124, 21 Ky. L. Rep. 1600, 55 S. W. 887, 49 L. R. A. 251 (1900); Farley v. Lavary, 107 Ky. 523, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383 (1900).

*Missouri.*—Collier v. Langan T. S. & M. Co. (Mo. App.), 127 S. W. 435 (1910).

*New York.*—Jackson Architectural Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899).

*Pennsylvania.*—Lloyd v. Haugh & K. Transfer Co., 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188 (1909).

*Utah.*—Benson v. Oregon S. L. Ry. Co. (Utah), 99 Pac. 1072 (1909).

*Washington.*—Gates v. Bekins, 44 Wash. 422, 87 Pac. 505 (1906).

*Canada.*—Culver v. Lester, 37 Can. L. J. 421 (1901).

him and that he must therefore make a separate agreement as to his charges in each case.

**§ 231. Indiscriminate service—irrigation.**

The test, as will have been seen, is whether service is rendered upon special contract to certain persons selected by the owners or whether all applicants are served without discrimination. The irrigation cases [1] which at first seem bothersome turn upon this point. In a recent case [2] this distinction was made plain. "Its status is that of either a private or public agency, depending upon whether its diversion is for the purpose of supplying owners or possessors of arable and irrigable land with whom it has fixed contractual relations, binding it to perform such service, or whether its purpose or practice be to supply owners or possessors of such land who are not its water right holders, or with whom it has not bound itself by contract to permanently render such service. If it confines its service as the private agent of certain appropriators, it cannot be compelled to render service to others. On the other hand, if it undertakes to and does divert and carry water for the use of consumers with whom it is not bound by such contracts, and hence becomes a public agency, it cannot, under the law, discriminate by giving preference otherwise than with due regard to priority of appropriation."

**§ 232. Public profession—warehousing.**

In the same way, the proprietors of some warehouses will be found to be carrying on a public business while the owners of other warehouses will be seen to be engaged

[1] Such as Wheeler v. Northern Colorado Irr. Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603 (1887). See § 93, *supra*, as to irrigation service in general.

[2] Slosser v. Salt River Valley Co., 7 Ariz. 376, 65 Pac. 332 (1901). See § 242 as to public profession in irrigation service.

in no public business whatever; which of these cases we have is again a question of fact, whether upon the whole proof it is shown that there has been a profession to serve the public in general or whether the owner has been using his warehouse simply in his private business. It is, consequently, constitutional for the State to regulate the charges of public warehousemen as was held in the leading case of Munn v. Illinois.[1] But it is obviously unconstitutional for the State to attempt to regulate the services of a person who simply owns a warehouse that he uses for himself, as the United States Supreme Court said in the later case of Brass ex rel. v. Stoesser.[2] Wharfs stand upon the same basis as warehouses. Such wharfage facilities are only public in character when proprietors have undertaken to accommodate shipping in general.[3] Such wharfingers can only charge reasonable rates as the United States Supreme Court pointed out in the early case of Transportation Company v. Parkersburg. The more common case probably is that of private wharves where the owners transact their own business and where they

[1] 94 U. S. 113, 24 L. ed. 77 (1876).
See also:
*United States.*—Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 12 S. Ct. 468 (1891).
*Illinois.*—Hannah v. The People, 198 Ill. 77, 64 N. E. 776 (1902).

[2] 153 U. S. 391, 38 L. ed. 757, 14 Sup. Ct. 857 (1894).
See also:
*Minnesota.*—State v. W. W. Cargill Co., 77 Minn. 223, 79 N. W. 962 (1899), affirmed in 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. 423 (1900).
*Pennsylvania.*—Girard Storage Co. v. Southwark Co., 105 Pa. St. 248 (1884).

[3] *United States.*—Transportation Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 S. Ct. 732 (1882).
*District of Columbia.*—District v. Johnson, 1 Mackey, 51 (1881).
*Florida.*—Indian River Steamboat Co. v. East Coast Transportation Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).
*Georgia.*—Macon, D. & S. R. R. Co. v. Graham, 117 Ga. 555, 43 S. E. 1000 (1903).
*Louisiana.*—Aiken & Co. v. Eager & Co., 35 La. Ann. 567 (1883).
*Washington.*—Barrington v. Commercial Dock Co., 15 Wash. 170, 45 Pac. 748, 33 L. R. A. 116 (1896).

occasionally by special contract permit the vessels of others to moor.[1] Such wharves are private in character, as the United States Supreme Court held in the recent case of Weems Steamboat Company v. People's Steamboat Company.

*Topic C. Characteristics of Private Business*

**§ 233. Private contract as the basis.**

To make the contrast, the chief characteristic of private dealing is the usual necessity for special agreement with the proprietor, there being no regular course in such special services. "The person who occasionally entertains others for a reasonable compensation is no more subject to the extraordinary responsibility of an innkeeper than he is liable as a common carrier who in certain special cases carries the property of others from one place to another for hire." [2] Especially where the business is incidental, the employment being intermittent, it will usually be obvious that the business is being conducted upon a private basis; or, as the test is put in one of the early leading English cases: "The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry

[1] *United States.*—Louisville & N. R. R. Co. v. West Coast Naval Stores Co., 198 U. S. 483, 49 L. ed. 1135, 25 S. Ct. 745 (1905); Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. 661 (1909); Leverich v. City of Mobile, 110 Fed. 170 (1867).

*New York.*—Woodruff v. Havemeyer, 106 N. Y. 129, 12 N. E. 628 (1887); Thousand Island S. S. Co. v. Visger, 86 N. Y. App. Div. 126, 83 N. Y. Supp. 325 (1903).

*Pennsylvania.*—Audenreid v. P. & R. R. R. Co., 68 Pa. St. 370, 8 Am. Rep. 195 (1871).

*Tennessee.*—Memphis Freight Co. v. Mayor, etc., of Memphis, 4 Cold. 419 (1867).

[2] Quoted from Lyon v. Smith, Morris (Iowa), 184 (1843). See § 106, *supra*, § 239, *infra*.

for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried." [1]

**§ 234. Occasional business—householders.**

One of the principal characteristics of a public service is that it is almost always well established as a permanent business and not regarded as an incidental employment. Thus it ought not to be difficult to distinguish between innkeepers [2] who openly carry on that business and householders [3] who occasionally entertain guests. "To render a person liable as a common innkeeper, it is not sufficient to show that he occasionally entertains travelers. Most of the farmers in a new country do this, without supposing themselves answerable for the horses or other property of their guests which may be stolen, or otherwise lost, without any fault of their own. Nor is such the rule in older countries, where it would operate with far less injustice, and be less opposed to good policy than with us. To be subjected to the same responsibilities attaching to innkeepers, a person must make tavern keeping, to some extent, a regular business, a means of livelihood. He should hold himself out to the world as an innkeeper." [4]

**§ 235. Casual employment—shipowners.**

The principle that casual employment is not common

[1] Quoted from Nugent v. Smith, 1 C. P. D. 19 (1875). See § 160, *supra*, § 238, *infra*.

[2] *California.*—Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867).

*Connecticut.*—Walling v. Potter, 35 Conn. 183 (1868).

*Iowa.*—Lyon v. Smith, Morris, 184 (1843).

*Kentucky.*—Kisten v. Hildebrand, 9 B. Mon. 72, 48 Am. Dec. 416 (1848).

*Tennessee.*—Dickerson v. Rogers, 4 Humph. 179, 40 Am. Dec. 642 (1843).

[3] *Kentucky.*—Southwood v. Myers, 3 Bush, 681 (1868).

*New York.*—People v. Jones, 54 Barb. 311 (1863).

*Texas.*—Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218 (1858).

*Vermont.*—Clary v. Willey, 49 Vt. 55 (1876).

[4] Lyon v. Smith, *supra*.

carriage is well illustrated by the case of the charter of vessels. If the vessel is casually employed it is not a common carrier. The leading case on this point is Allen v. Sackrider [1] where Mr. Justice Parker said in part: "The only question in the case is, were the defendants common carriers? The facts found by the referee do not, I think, make the defendants common carriers. They owned a sloop; but it does not appear that it was ever offered to the public or to individuals for use, or ever put to any use, except in the two trips which it made for the plaintiffs, at their special request. Nor does it appear that the defendants were engaged in the business of carrying goods, or that they held themselves out to the world as carriers, or had ever offered their services as such. This casual use of their sloop in transporting plaintiffs' property falls short of proof sufficient to show them common carriers." And generally where a vessel is chartered by the owner, the charter being necessarily an isolated transaction, the owner does not thereby become a common carrier.[2]

### § 236. Intermittent employment—teamsters.

Where the employment is intermittent and not a regular matter of business, the carrier is not a common carrier. It is a rule which will generally hold good, that one employed for hire *pro hac vice* only, who on the evidence does not make the carriage of goods his constant occupation, is not liable as a common carrier. There are a few cases which seem to hold that even in such casual employment

[1] 37 N. Y. 341 (1867).

See also:

*Delaware.*—Pennewill v. Cullen, 5 Harr. (Del.) 238 (1849).

*New York.*—Aymar v. Astor, 6 Cow. 266 (1826).

[2] Cases of this sort are:

*United States.*—Lamb v. Parkman, 1 Sprague, 343 (1857); Sumner v. Caswell, 20 Fed. 249 (1884); The Dan, 40 Fed. 691 (1889).

*Kentucky.*—Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky. 728, 88 S. W. 318 (1905).

the carrier may be held liable as an insurer.[1] But upon examination these will be found to be cases of a temporary undertaking upon a public basis.[2] A wagoner is not often a common carrier when he carries goods of another along with his own.[3] And the owner of a cart who makes contracts for special jobs is plainly carrying on a private business.[4] Furniture movers are generally held to be private carriers because of the intermittent nature of their employment.[5] But there are cases of teaming which seem to be upon such a regular basis as to be common carriage.[6]

[1] *Pennsylvania.* — Gordon v. Hutchinson, 1 W. & S. 285, 37 Am. Dec. 464 (1841).

*Tennessee.*—Moss v. Bettis, 4 Heisk. 661, 13 Am. Rep. 1 (1871).

[2] *Mississippi.*—Harrison v. Roy, 39 Miss. 396 (1860).

*Texas.*—Chevallier v. Straham, 2 Tex. 115 (1847).

[3] *Louisiana.*—Flautt v. Lashley, 36 La. Ann. 106 (1884).

*Vermont.*—Beckwith v. Frisbie, 32 Vt. 559 (1860).

[4] *Canada.*—Roussel v. Aumais, Rap. Jud. Quebec, 18 C. S. 474 (1900).

*Ceylon.*—Gibson v. Silva, Rama-Nathan, 105 (1848).

[5] *Illinois.*—Armfield v. Humphrey, 12 Ill. App. 90 (1882).

*Missouri.*—Jamiet v. American Storage Co., 109 Mo. App. 257, 84 S. W. 128 (1904).

*New Hampshire.*—Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431 (1895).

*South Carolina.*—Piedmont Mfg. Co. v. Columbia & G. R. R. Co., 19 S. C. 353 (1882).

[6] *New York.*—Snelling v. Yetter, 25 App. Div. 590, 49 N. Y. Supp. 917 (1898).

*Pennsylvania.*—Lloyd v. Haugh & K. Transfer Co., 223 Pa. St. 148, 72 Atl. 516, 21 L. R. A. (N. S.) 188 (1909).

*Utah.*—Benson v. Oregon S. L. Ry. Co. (Utah), 99 Pac. 1072 (1909).

*Washington.*—Gates v. Bekins, 44 Wash. 422, 87 Pac. 505 (1906).

Notwithstanding the language of the earlier cases in Missouri it is now held that a company which holds itself out as ready to move furniture for all comers is a common carrier *pro hac vice.* Collier v. Langan, T. S. & M. Co. (Mo. App.), 127 S. W. 435 (1910).

Reference might here be made to the Massachusetts cases under the statute providing that liquors cannot be delivered in a no-license town except by regular expressmen. Under this statute a carter who professed a willingness to carry express matter in general but who, as a matter of fact, is carrying only liquors, is held not to be within the meaning of the statute as it is held

**§ 237. Limited undertakings—ferries.**

The salient characteristics of a private business is that there is no solicitation of the custom of the general public. The many cases dealing with private ferries well illustrate this. Where a private ferry is established to convey persons to and from the premises of a private individual, who may refuse to receive any person upon his premises, the ferry is not operated as a public employment. A ferry established to convey persons to a picnic ground [1] is private. So is a boat operated when employés engaged in other work are at leisure.[2] A wherry regularly conveying the laborers of its owner to their work is a private ferry.[3] So is a skiff which is offered as a free conveyance to persons who will come to the store of its owner for trade.[4] A miller who maintains a ferry to convey customers to his mill,[5] is not a common carrier, even where other persons are sometimes transported as a matter of accommodation who give a gratuity to the servant managing the boat.[6] And where several parties joined to maintain a boat for the purpose of conveying their cattle across a river to a slaughter house the conveyance was not common carriage.[7] In all of these cases the service maintained was

to call for "fixedness and permanence" in the character of the business and probably also for stated times and established routes. See Commonwealth v. People's Exp. Co., 201 Mass. 564, 88 N. E. 420 (1909).

[1] People v. Mago, 69 Hun, 559, 23 N. Y. Supp. 938 (1893). And see Meisner v. Detroit, B. & I. W. Ferry Co., 154 Mich. 545, 118 N. W. 14 (1908), *accord*.

[2] Roussel v. Aumais, Rap. Jud. Quebec, 18 C. S. 474 (1900).

[3] Tadhunter v. Buckley, 7 L. T. (N. S.) 273 (1862).

[4] Shinn v. Cotton, 52 Ark. 90, 12 S. W. 157 (1889). But see Hatten v. Turman, 123 Ky. 844, 97 S. W. 770 (1906).

[5] Self v. Dunn, 42 Ga. 528, 5 Am. Rep. 544 (1871).

[6] Littlejohn v. Jones, 2 McMull. L. (S. C.) 366, 39 Am. Dec. 132 (1842).

[7] Flautt v. Lashley, 36 La. Ann. 106 (1884).

And see Blanchard v. Abraham, 115 La. 989, 40 So. 379 (1906).

held private because of the limitations put upon its conduct by its proprietors.

**§ 238. Incidental service—merchants.**

One who is engaged carrying on transportation primarily for his own purposes is not engaged in common carriage. Thus one who is delivering property which is the subject of a contract between himself and its owner, is at most a private carrier in view of his relations with his contracting party. So one who contracts to cut timber, and transport it to the place where it is to be delivered and used, was held not to incur the responsibility of a common carrier.[1] And, similarly, a manufacturer who purchased a machine and contracted with the seller to cart it was held not to be a common carrier.[2] In another case of this sort [3] a warehouseman delivering goods from storage was held not to be liable as a common carrier. Similarly an omnibus employed by the proprietor of a hotel in taking guests free to and from a railroad station is not a public conveyance.[4]

*Topic D. Particular Illustrations of the Distinction*

**§ 239. Public and private carriers in general.**

Naturally enough there are more cases upon the distinction between public and private carriers than upon any other calling. Many illustrations of this distinction have already been given in this and a preceding chapter. It will be sufficient, therefore, to give but a brief

[1] *New York.*—Pike v. Nash, 3 Abb. App. Dec. 610 (1864).

*Canada.*—Benedict v. Arthur, 6 Up. Can. Q. B. 204 (1849).

[2] *Michigan.*—Allis v. Voigt, 90 Mich. 125, 51 N. W. 190 (1892).

*England.*—Chattock v. Bellamy, 64 L. J. Q. B. 250 (1895).

[3] Armfield v. Humphrey, 12 Ill. App. 90 (1882).

But see Snelling v. Yetter, 25 N. Y. App. Div. 590, 49 N. Y. Supp. 917 (1898), apparently, *contra.*

[4] City of Oswego v. Collins, 38 Hun, 171 (1885).

summary. If the carrier is commonly serving all who intrust him with goods to be taken over his route, he is in public employment.[1] It is the willingness to serve all that makes the employment a public one. And therefore the carrier who holds himself out as ready to carry for all on a particular journey or voyage is at that moment a common carrier, though this is his first journey and he has never yet carried; and this may be equally the case though he does not intend to continue the profession and makes the offer for a single journey only. If on the other hand the carrier does not deal with the public indiscriminately as a matter of routine but in effect makes an individual bargain in each case, this course of business shows that the service is upon a private basis.[2]

[1] The following are regarded as particularly good cases on public carriage:

*United States.*—Propeller Niagara v. Cordes, 21 How. 7, 16 L. ed. 41 (1858).

*Alabama.*—Babcock v. Herbert, 3 Ala. 392, 37 Am. Dec. 695 (1842).

*Arizona.*—Santa Fe P. & P. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910).

*California.*—Pfister v. Central Pacific R. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404 (1886).

*Connecticut.*—Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745 (1838).

*Florida.*—Bennett v. Filyaw, 1 Fla. 403 (1847).

*Georgia.*—Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847).

*Kentucky.*—Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466 (1834).

*Mississippi.*—Harrison v. Roy, 39 Miss. 396 (1860).

*Missouri.*—Collier v. Langan T. S. & M. Co. (Mo. App.), 127 S. W. 435 (1910).

*New Hampshire.*—Elkins v. Boston & Maine R. R. Co., 23 N. H. 275 (1851).

*New York.*—Jackson A. Iron Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899).

*Texas.*—Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639 (1849).

*West Virginia.*—Gillingham v. Ohio River R. R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827 (1891).

*Wisconsin.*—Doty v. Strong, 1 Pin. 313, 40 Am. Dec. 773 (1843).

[2] The following are regarded as good cases on private carriage:

*United States.*—Lamb v. Parkman, 1 Sprague, 343, 40 Fed. 691 (1857); The Wildenfels, 161 Fed. 864 (1908).

*Arkansas.*—Shinn v. Cotton, 52 Ark. 90, 12 S. W. 157 (1889).

**§ 240. Public inn and private house.**

The distinction between the public innkeeper and the ordinary householder turns upon the presence of public profession or its absence. The question whether a house where a guest is entertained is a public inn or a private house is a question of fact to be determined like any other fact upon all the evidence. An innkeeper, as has been seen, undertakes the entertainment of guests as a regular business, taking usually all who apply; and he is held answerable to the extent of his profession.[1] On the other hand it often happens, particularly in new countries where inns are not yet numerous, that householders occasionally, or even frequently, accommodate travelers, unless it is inconvenient to do so. This is not conducting a regular business upon a public basis, and such practice is wholly consistent with private action.[2]

*Georgia.*—Self v. Dunn, 42 Ga. 528, 5 Am. Rep. 544 (1871).

*Michigan.*—Allis v. Voigt, 90 Mich. 125, 51 N. W. 190 (1892).

*New Hampshire.*—Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431 (1895).

*New York.*—Allen v. Sackrider, 37 N. Y. 341 (1867).

*Ohio.*—Weaver v. Wible, 20 Ohio, 270 (1855).

*Vermont.*—Spencer v. Daggett, 2 Vt. 92 (1829).

[1] *California.*—Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867).

*Connecticut.*—Walling v. Potter, 35 Conn. 183 (1868).

*Illinois.*—Bullock v. Adair, 63 Ill. App. 30 (1895).

*Iowa.*—Lyon v. Smith, Morris, 184 (1843).

*Kentucky.*—Kisten v. Hildebrand, 9 B. Mon. 72, 48 Am. Dec. 416 (1848).

*Minnesota.*—Johnson v. Chadbourn Furnace Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571 (1903).

*New York.*—Wintermute v. Clarke, 5 Sandf. 242 (1851).

*North Carolina.*—State v. Matthews, 2 Dev. & B. 424 (1837).

*England.*—Thompson v. Lacy, 3 B. & Ald. 283 (1820).

[2] *United States.*—Beall v. Beck, Fed. Cas. 1,161 (1829).

*Georgia.*—Bonner v. Welborn, 7 Ga. 296 (1849).

*Kentucky.*—Southward v. Myers, 3 Bush, 681 (1868).

*North Carolina.*—Holstein v Phillips, 146 N. C. 366, 59 S. E 1037, 14 L. R. A. (N. S.) 475 (1907).

*Pennsylvania.* — Commonwealth v. Cuncannon, 3 Brewst. 344 (1869).

## § 241. Public and private highways of every sort.

Even as to highways when constructed by private capital there are the two possibilities. Ferries [1] and bridges [2] will be public or private according to whether the pro-

*Texas.*—Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218 (1858).

*Vermont.*—Clary v. Willey, 49 Vt. 55 (1876).

[1] As to public ferries, see:

*Alabama.*—Frierson v. Frazier, 142 Ala. 232, 37 So. 825 (1904).

*Arkansas.*—Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595 (1870).

*Illinois.*—Claypool v. McAllister, 20 Ill. 504 (1858).

*Iowa.*—Whitmore v. Bowman, 4 Green, 148 (1853).

*Kentucky.*—Hall v. Renfro, 3 Met. 51 (1860).

*Mississippi.*—Powell v. Mills, 37 Miss. 691 (1859).

*New York.*—Wyckoff v. Queen's County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650 (1873).

*North Carolina.*—Spivy v. Farmer, 2 Hawy. 339 (1805).

*Ohio.*—Wilson v. Hamilton, 4 Oh. St. 722 (1855).

*Tennessee.*—Sanders v. Young, 1 Head, 219, 73 Am. Dec. 175 (1858).

As to private ferries, see:

*Arkansas.*—Shinn v. Cotton, 52 Ark. 90, 12 S. W. 157 (1889).

*Georgia.*—Self v. Dunn, 42 Ga. 528, 5 Am. Rep. 544 (1871).

*Louisiana.*—Flautt v. Lashley, 36 La. Ann. 106 (1884).

*Michigan.*—Meisner v. B. I. & W. Ferry Co., 154 Mich. 545, 118 N. W. 14 (1908).

*New York.*—People v. Mago, 69 Hun, 559, 23 N. Y. Supp. 938 (1893).

*South Carolina.*—Littlejohn v. Jones, 2 McMull. 366, 39 Am. Dec. 132 (1842).

*England.*—Tadhunter v. Buckley, 7 L. T. (N. S.) 273 (1862).

*Canada.*—Roussel v. Aumais, Rap. Jud. Quebec, 18 C. S. 474 (1900).

[2] As to public bridges, see:

*United States.*—Covington, etc., Turnpike Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198 (1896).

*California.*—People v. San Francisco & A. R. R. Co., 35 Cal. 606 (1868).

*Georgia.*—McLeod v. Savannah, Albany & Gulf R. R. Co., 25 Ga. 445 (1858).

*Kentucky.*—Arnold v. Cov. & Cin. Bridge Co., 1 Duval, 372 (1864).

*Maine.*—Bussey v. Gilmore, 3 Me. 191 (1824).

*Massachusetts.*—Central Bridge Corporation v. Sleeper, 8 Cush. 324 (1851).

*New York.*—Thompson v. Matthews, 2 Ed. Ch. 212 (1834).

*Ohio.*—Young v. Buckingham, 5 Ohio, 485 (1832).

*Pennsylvania.*—Pittsburg & W. E. Passenger Ry. v. Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323 (1894).

As to private bridges the same principles prevail:

See Manning v. City of Devils Lake, 13 N. D. 47, 99 N. W. 51, 65 L. R. A. 187 (1904).

prietors have manifested their intention to serve the public or not. Such of these as have accepted some special public franchise in aid of their construction cannot be heard to say that they have not undertaken public service. And those which are claiming such rights must be certain that they have never acted so as to make manifest any disclaimer of public employment. All this is true of canals [1] and turnpikes.[2]

**§ 242. Public and private water supply and irrigation.** Waterworks and irrigation systems will be public or private according to whether there is public profession or private dealing in the particular case. The supply of water to a city for domestic purposes will almost always be found to have been undertaken upon a public basis [3]

[1] As to public canals, see:

*Georgia.*—Savannah Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937 (1893).

*Illinois.*—People v. Improvement Co., 103 Ill. 491 (1882).

*New York.*—Pennsylvania Coal Co. v. Del. & H. Canal Co., 31 N. Y. 91 (1865).

*Pennsylvania.* — Commonwealth v. Delaware & H. Canal Co., 43 Pa. St. 295 (1862).

As to private canals, see:

*Louisiana.*—Harvey v. Potter, 19 La. Ann. 264, 92 Am. Dec. 532 (1867).

*Michigan.*—Potter v. Railway Co., 95 Mich. 389, 54 N. W. 956 (1893).

[2] As to public roads, see:

*United States.*—Covington & L. Turnpike Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198 (1896).

*Kentucky.*—Winchester, etc., Turnpike Road Co. v. Croxton, 98 Ky. 739, 34 S. W. 518 (1896).

*Michigan.*—Attorney General v. Detroit & Erie Plank Road Co., 2 Mich. 138 (1851).

*Ohio.*—Chagrin Falls & Cleveland Plank Road Co. v. Cane, 2 Ohio St. 419 (1853).

As to private roads, see:

*Alabama.*—Sadler v. Langham, 34 Ala. 311 (1859).

*West Virginia.*—Varner v. Martin, 21 W. Va. 534 (1883).

[3] In the following cases dealing with water supply a special point is made of the public profession of the company:

*United States.*—Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 S. Ct. 718 (1897).

*Alabama.*—City of Mobile v. Bienville Water Co., 130 Ala. 379, 30 So. 445 (1900).

*California.*—McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264 (1885).

*Georgia.*—Freeman v. Macon Gas

but there are cases where it has been pointed out that the works must be conducted for the use of the inhabitants in common and not for a particular individual.[1] There are special complications with regard to irrigation; but without going into the technical law applying to the question of water rights in those States where irrigation systems are usual, it may be pointed out here that these systems are of two sorts — the one public, where the irrigation company is engaged in selling water to others than its water right holders; [2] the other private, where no more is undertaken than the supply of water to those who have associated to construct the system.[3]

& Water Co., 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917 (1906).

*Kansas.* Asher v. Water, Light, & Power Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52 (1903).

*Maine.* Rockland Water Co. v. Adams, 84 Me. 472, 24 Atl. 840, 30 Am. St. Rep. 368 (1892).

*Massachusetts.* Lumbard v. Stearns, 4 Cush. 60 (1849).

*Montana.*— State v. Butte Water Co., 18 Mont. 199, 44 Pac. 966, 56 Am. St. Rep. 574 (1896).

*New Jersey.*—Olmstead v. Proprietors of the Morris Aqueduct, 47 N. J. L. 311 (1885).

*North Carolina.* Griffin v. Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240 (1898).

*Oregon.* Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

*Tennessee.* Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897).

[1] See as to the possibility of private water supply:

*California.* — McFadden v. County of Los Angeles, 74 Cal. 571, 16 Pac. 397 (1888).

*New York.* Pocantico Water Co. v. Bird, 130 N. Y. 249, 29 N. E. 246 (1891).

[2] In the following cases, dealing with irrigation, the necessary consequences of public profession are discussed:

*United States.* Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 S. Ct. 56 (1896).

*Arizona.*— Sloser v. Salt River Canal Co., 7 Ariz. 376, 65 Pac. 332 (1901).

*California.*— Price v. Riverside L. & Irrigating Co., 56 Cal. 431 (1880).

*Colorado.*—Wheeler v. Northern Colorado Irrigation Co., 10 Col. 582, 17 Pac. 487, 3 Am. St. Rep. 603 (1887).

*Nebraska.* -Paxton & H. Irrigating C. & L. Co. v. Farmers' & M. Irrigation Co., 45 Neb. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585 (1895).

[3] See as to private irrigation:

**§ 243. Public and private gas and electricity.**

That the business of supplying gas is public in character is now universally recognized, provided that the company supplying is committed to supplying gas to the community in general.[1] But the case can be imagined of an institution with a generating plant for its own supply, which might even supply one neighbor without being obliged to sell to all others.[2] In the same way the business of supplying electrical energy has generally been recognized as public in character.[3] There are, however,

*United States.*—Bradley v. Fallbrook Irrigation Co., 68 Fed. 948 (1895).

*Arizona.*—Gould v. Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598 (1904).

*California.*—Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537 (1892).

*Colorado.*—Rocky Ford Canal, etc., Co. v. Simpson, 5 Colo. App. 30, 36 Pac. 638 (1894).

*Montana.*—Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757 (1897).

*Washington.*—Prescott Irrigation Co. v. Flathers, 20 Wash. 454, 55 Pac. 635 (1899).

[1] The following cases among others discuss incidentally the public undertaking of gas companies:

*United States.*—Gibbs v. Consolidated Gas Co., 130 U. S. 396, 32 L. ed. 979, 9 S. Ct. 553 (1888).

*Indiana.*—Portland Gas & Oil Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639 (1893).

*Massachusetts.*—Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487 (1890).

*New Jersey.*—Public Service Corporation v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482 (1904).

*West Virginia.*—Charleston Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410 (1901).

[2] As to the possibility of private gas supply, see Redkey, etc., Natural Gas v. Orr (Ind.), 60 N. E. 716 (1901).

[3] In the following cases as to electric supply a point is made of public profession:

*United States.*—Walker v. Shasta Power Co., 160 Fed. 856, 87 C. C. A. 660 (1908).

*Georgia.*—Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122 (1906).

*Illinois.*—Snell v. Clinton Electric Light Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341 (1902).

*New Hampshire.*—Rockingham Light & Power Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581 (1904).

*New York.*—Armour Packing Co. v. Edison Electric Co., 100 N. Y. Supp. 605, 115 N. Y. App. Div. 51 (1906).

*Ohio.*—Cincinnati, H. & D. R. R.

several cases where the company supplying electricity has not professed to sell to the public indiscriminately at regular rates, but has from the beginning adopted the policy of entering into special contracts upon its own terms; such companies are plainly engaged in private business.[1]

**§ 244. Public and private telephone and telegraph.**

The public status of a telephone system which is at the disposal of the whole community has already been elaborately discussed;[2] but a telephone system of a private character is not unknown, as a line run between various farms in the country might often be so conducted as to show no intention to receive other persons into the association.[3] So too although the public character of the

Co. v. Bowling Green, 57 Oh. St. 336, 49 N. E. 121, 41 L. R. A. 422 (1897).

*Oregon.* — Grande Ronde Electrical Co. v. Drake, 46 Oreg. 243, 78 Pac. 1031 (1905).

[1] The following are cases of electric supply upon a private basis:

*Vermont.*—Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 817, 98 Am. St. Rep. 818 (1902).

*Virginia.*—Fallsburg Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855 (1903).

[2] In most of the leading telephone cases the essential quality of public profession is emphasized; see:

*United States.*—Cumberland Tel. & Tel. Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268 (1908).

*Indiana.*—Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201 (1885).

*Maryland.*—Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167 (1886).

*Nebraska.*—State ex rel. Webster v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885).

*North Carolina.*—People ex rel. Telegraph Cable Co. v. Hudson Riv. Telegraph Co., 19 Abb. N. C. 466 (1887).

*Pennsylvania.*—Bell Telephone Co. v. Commonwealth, 3 Atl. 825 (1886).

*South Carolina.*—State v. Telephone Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870 (1901).

*Vermont.*—Commercial Telegraph Co. v. Telephone Co., 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161 (1888).

[3] As to the possibility of private telephone lines, see Cumberland Tel. & Tel. Co. v. Cartwright Tel.

established telegraph lines cannot be doubted [1] there are private wires connecting offices which are not operated for general business.[2]

Co., 128 Ky. 395, 108 S. W. 875 (1908).

[1] The following citations are selected from the many cases establishing the public character of telegraph companies because the essential characteristic of public profession is mentioned:

*United States.*—Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. ed. 765, 21 S. Ct. 561 (1900).

*Maine.*—Ayer v. Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353 (1887).

*Mississippi.*—Western Union Telegraph Co. v. Mississippi R. R. Commission, 74 Miss. 80, 21 So. 15 (1896).

*Nebraska.*—Western Union Tel. Co. v. Call Pub. Co., 44 Neb. 326, 62 N. W. 506, 27 L. R. A. 622, 48 Am. St. Rep. 729 (1895).

*North Carolina.*—Green v. Telegraph Co., 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985 (1904).

[2] As to the possibility of a private telegraph service see Renville, Matter of, 46 N. Y. App. Div. 37, 61 N. Y. Supp. 549 (1899).

# CHAPTER VIII

## EXTENT OF SERVICE PROFESSED

§ 250. Limitations upon the profession.

*Topic A. Kinds of Service Undertaken*

§ 251. Extent to which limitations may be imposed.
252. Businesses of limited scope.
253. Obligation in respect to the usual class.
254. No obligation to undertake different services.
255. Carriage of valuables separable.
256. Carriage of live stock.
257. Carriage of rolling stock.
258. Profession limited to car service.
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*Topic B. Separable Services for Different Purposes*

§ 261. Separable services in general.
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§ 267. Profession to devote facilities.
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269. Obligation limited to existing premises.
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275. Change in municipal boundaries.
276. Obligation beyond the profession.

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278. What limits are reasonable.
279. Individual installation within the territory.
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281. Obligation to the community.
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**§ 250. Limitations upon the profession.**

Public profession not only establishes public obligation, but it largely determines the extent of the public duty. Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers. The primary question is, therefore, what their profession fairly covers; and this is again a question of fact rather than of law. In determining this fact, there is in many cases direct evidence, but in most cases it is again circumstantial; so that all that can be promised by way of general principle is that those in public service are bound to do for any new applicant the sort of thing in general that they have been doing for others. For it is plain that one by entering a public employment does not thereby undertake to perform any kind of service that may be asked of him. His obligation only extends to the sort of service that he has undertaken.[1] Considered in the large this is obvious and

[1] This is brought out, although in too extreme a form, by the way in which the question was introduced to the jury by a Federal judge, in a recent case: "The questions put, therefore, resolve themselves into this: Who shall have control of the operation of the road,—the company or its customers? Who shall determine what the railroad will transport,—the company or the shippers? Who shall say to what points the company will transport goods,—the company or its customers? Who shall say what the means and methods of transportation shall be,—the company or its customers? In short, who shall determine what the business of the company shall be and how it shall be carried on? Solved by the principle of the common law and common sense, it must be the company, as all will agree that no railroad could be operated at all by those who patronize it." Harp v. Choctaw, O. & G. Ry., 118 Fed. 169 (1902).

in many cases too plain for argument. In some businesses the narrow limitations upon the employment undertaken are obvious enough. One by entering a given public calling only commits himself to render the sort of service which is normally offered by those who follow this particular employment.[1] What in general is the nature of the service performed in each particular calling is a matter which was discussed as to each employment in turn in enumerating them in the first chapters of this treaties.

*Topic A. Kind of Service Undertaken*

**§ 251. Extent to which limitations may be imposed.**

This doctrine that the obligation may be limited by defining the service undertaken is pressed to extremes in the English decisions. In the leading case [2] it was held that a railroad which had not undertaken the carriage of coal between certain stations could not be required to do so although it was carrying coal between other stations. "A person may profess to carry a particular description of goods only, in which case he could not be compelled to carry other kind of goods," said the Exchequer Court, "or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to and from intermediate points." And in the Canadian cases the rule is made even more precise still, if that be possible. In them it is

[1] It follows as is brought out elaborately in a recent case in performing service which is not within the usual profession the service is generally private in character. "A common carrier may become a private carrier when as a matter of accommodation or special agreement it undertakes to carry something which it is not its business to carry." Santa Fe P. & P. R. R. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910).

[2] Johnson v. Midland Ry. Co., 4 Exch. 367 (1849). See also In re Oxlade & N. E. Ry. Co., 15 C. B. (N. S.) 680 (1864). See further Pitlock v. Wells, Fargo & Co., 109 Mass. 452 (1872).

held that any limitation publicly announced will govern. And according to the most extreme decision [1] a railway carrying timber of all kinds may announce that thenceforth it will carry no more cedar lumber; and thereafter it will be under no obligation to take cedar lumber, even although still carrying other timber.

**§ 252. This doctrine once pressed to extremes.**

This was clearly the original logic of the law, "At common law no person was a common carrier of any article unless he chose to be, and unless he held himself out as such; and he was a common carrier of just such articles as he chose to be, and no others. If he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier of agricultural implements such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses." [2] The American cases from the first were less extreme. In one of the earliest it was said that "a common carrier is bound to convey the goods of any person offering to pay his hire, unless his carriage be already full, or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey or is not in the habit of conveying." [3]

**§ 253. Obligation in respect to the usual class.**

Whatever may be the rule still in England, it is clear that in America a carrier who undertakes to carry cer-

[1] Rutherford v. Grand Trunk Ry. Co., 5 Rev. Leg. (Can.) 483 (1873).

See Leonard v. American Exp. Co., 26 U. C. Q. B. 533 (1867).

[2] Quoted from Kansas Pacific Ry. Co. v. Nichols & Co., 9 Kans. 235, 12 Am. Rep. 494 (1872).

[3] Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 343 (1847).

See Missouri Pacific Ry. Co. v. Hams, 1 W. & W. (Tex. Ct. App.) Dec., § 1263.

tain goods of a certain sort must carry all of the same general nature.[1] A wagoner who had professed to carry fruit could not refuse to carry vegetables. A steamboat which had received boxes, could not refuse casks. Where express matter is taken, packages of newspapers cannot be refused, and where general freight is taken, lumber cannot be refused.[2] That is, everything of the same general nature with the things carried, and readily transported in the same way and by the same means, must be taken.[3] "When a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carrying of the articles is embraced within the scope of its chartered powers, it is a common carrier of them." [4]

**§ 254. No obligation to undertake different services.**

Even if the goods are similar in bulk to goods actually carried, if they require special treatment, a carrier who has never professed to carry them may refuse to accept them as a common carrier. So where an express company had never professed to carry glass as a common carrier, and on the terms required of a common carrier a writ of mandamus to compel the company to receive and carry glass on such terms was refused.[5] And so where the goods are of a dangerous nature, it seems clear that the carrier may refuse to receive them on the ground that

[1] A railroad company is "bound to transport within the class of goods it carries." McIntosh v. Oregon Ry. & Nav. Co., 17 Idaho, 100, 105 Pac. 66 (1909).

[2] Ocean S. S. Co. v. Savannah L. W. & S. Co. (Ga.), 63 S. E. 577, 20 L. R. A. (N. S.) 867 (1909).

[3] To be common carriage the undertaking must be to carry goods of the kind which it has been professed will be carried. Santa Fe P. & P. Ry. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910).

[4] Quoted from Memphis News Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150 (1903).

[5] People v. Babcock, 16 Hun, 313 (1878).

he has never professed to carry goods of that kind.[1] Again, perishable goods such as fish, might perhaps be ruled out.[2] And even freight like molasses which may burst its barrels may be refused.[3] For as will be seen many times in the course of this discussion, there are for various natural reasons different classes of goods, and a practice of taking goods of one class does not establish any profession to take goods of another class. Thus a trucking company may make a specialty of handling heavy iron products.[4] Or van owners may confine their profession to moving household goods.[5]

**§ 255. Carriage of valuables separable.**

The distinction just drawn between what service is within the usual profession and what is outside the public obligation is one of much importance in the business of carriage since in a case of common carriage the liability for loss is greater than in a case of private carriage. As to certain things often carried there are, therefore, a surprising number of cases in which the rules relating to this problem are worked out. Thus the cases are numerous in which it is pointed out that an ordinary carrier of goods is seldom a carrier of valuables, especially currency.[6]

[1] California Powder Works v. A. & P. R. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648 (1896).

[2] Leonard v. American Exp. Co., 26 Up. Can. (Q. B.) 533 (1867).

[3] Tunnel v. Pettijohn, 2 Harr. (Del.) 48 (1835).

[4] Jackson A. Iron Wks. v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899).

[5] Collier v. Langan T. S. & M. Co. (Mo. App.), 127 S. W. 453 (1910).

[6] *United States.*—Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 16 (1841); Kuter v. Michigan Cent. R. R., 1 Biss. 35, 14 Fed. Cas. No. 7,955 (1853).

*California.*—Fay v. Steamer New World, 1 Cal. 348 (1850).

*District of Columbia.*—White v. Postal Tel. & Cable Co., 25 App. Div. D. C. 364 (1905).

*Illinois.*—Chicago, etc., R. R. Co. v. Thompson, 19 Ill. 578 (1858).

*Kentucky.*—Lee v. Burgess, 9 Bush, 652 (1873).

*Louisiana.*—Mechanics' & T. Bk. v. Gordon, 5 La. Ann. 604 (1850).

*Missouri.*—Choteau v. Steam-

But if it be shown in any case that the particular carrier is carrying the money as part of his regular business he will be held to be a common carrier.[1] The charge of Mr. Justice Story [2] to a Federal jury is always referred to in this connection, for the distinctions which are drawn. "The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged? They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters." To apply this early rule to modern conditions, the express company is almost always a common carrier of money by its general practice.[3] Thus an express company would be held a common carrier of the money it is bringing back as the result of the sale of a shipment sent C. O. D.[4]

boat St. Anthony, 16 Mo. 216 (1852).

*New York.*—Sewall v. Allen, 6 Wend. 335 (1830); Kemp v. Coughtry, 11 Johns. 107 (1814).

*North Carolina.*—Pender v. Robbins, 6 Jones, 207 (1858).

[1] *United States.*—Hollman v. Holladay, 1 Woolw. 365 (1868).

*Alabama.*—Hosea v. M'Crory, 12 Ala. 349 (1847).

*Massachusetts.* — Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133 (1822).

*New York.*—Allen v. Sewell, 2 Wend. 327 (1829).

*Tennessee.*—Kirtland v. Montgomery, 1 Swan, 452 (1852).

*Vermont.*—Farmers' & M. Bank v. Champlain Tr. Co., 23 Vt. 186, 56 Am. Dec. 68 (1851).

*England.*—Anonymous, 12 Mod. *3 (1702).

[2] Citizens' Bank v. Nantucket Steamboat Co., 2 Story (U. S.), 16 (1841).

[3] *United States.*—Kuter v. Michigan Cent. R. R. Co., 1 Biss. 35, 14 Fed. Cas., No. 7,955 (1853); St. John v. Express Co., 1 Woods, 612 (1871).

*California.*—Pfister v. Central Pacific R. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404 (1886).

[4] Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341 (1865).

But an express company need not engage in C. O. D. business.

Burke v. Platt, 172 Fed. 777 (1909).

**§ 256. Carriage of live stock.**

Another prominent matter in the topic under discussion is the carriage of live stock. The carriage of live stock was not ordinarily within the profession of the early carriers as they had no vehicles large enough for such carriage. Therefore when the railways came in, it was doubted in England [1] whether their carriage could be obligatory unless express undertaking with respect to them could be found; and in one American jurisdiction, Michigan,[2] it was decided that this special profession was necessary. But this is not the sort of reasoning that appeals to American courts, and it is now almost universally agreed that live stock constitutes one of the many classes of goods which the modern railway undertakes to carry for the public generally and that the railway is therefore a common carrier of live stock in its freight trains.[3] This

[1] Blower v. Gt. Western Ry. Co., L. R. 7 C. P. 655, and cases cited (1872).

[2] Such carriage is, therefore, not common carriage usually in Michigan. Michigan S. R. R. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466 (1870); Lake Shore & M. S. R. R. v. Perkins, 25 Mich. 329, 12 Am. Rep. 275 (1872); American Merch. Union Exp. Co. v. Phillips, 29 Mich. 515, 58 N. W. 651 (1874); Smith v. Michigan Cent. R. Co., 100 Mich. 148, 43 Am. St. Rep. 440 (1894).

[3] *United States.*—Myrick v. Michigan Cent. R. R. Co., 107 U. S. 102, 27 L. ed. 325 (1882). See Interstate Stockyards Co. v. Indianapolis Ry. Co., 99 Fed. 472 (1900).

*Alabama.*—South & N. A. R. R. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578 (1875).

*Arkansas.*—Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961 (1892).

*Florida.*—Summerlin v. Seaboard Air L. Ry. Co., 56 Fla. 687, 47 So. 557, 19 L. R. A. (N. S.) 191 (1908).

*Georgia.*—Central of Ga. Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170 (1905).

*Illinois.*—Illinois Cent. R. R. v. Hall, 58 Ill. 409 (1871).

*Indiana.*—Chicago, etc., R. Co. v. Woodward, 164 Ind. 360, 72 N. E. 558 (1904).

*Iowa.*—McCoy v. Railroad, 44 Iowa, 424 (1876).

*Kansas.*—Kansas, etc., R. R. v. Reynolds, 8 Kan. 623 (1871).

*Kentucky,*—Hall v. Renfro, 3 Met. 51 (1860).

*Maine.*—Sager v. Portsmouth, etc., Railroad, 31 Me. 228, 50 Am. Dec. 659 (1850).

*Massachusetts.*—Evans v. Fitchburg R. R., 111 Mass. 142, 15 Am. Rep. 19 (1872).

was strongly stated in an early Kansas case,[1] in which the usual functions of the modern railway are thus described: "It can hardly be supposed that they were created for the mere purpose of taking the place of pack-horses, or clumsy wagons, often drawn by oxen or such other primitive means of carriage and transportation as were used in England prior to 1607. Railroads are undoubtedly created for the purpose of carrying all kinds of property which the common law would have permitted to be carried by common carriers in any mode, either by land or water, which probably includes all kinds of personal property."

## § 257. Carriage of rolling stock.

This general principle that the railways generally must

*Minnesota.*—Moulton v. St. Paul, M. & N. Railroad Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781 (1883).

*Mississippi.*—Chicago, St. L., & N. O. R. R. Co. v. Abels, 60 Miss. 1017 (1883).

*Missouri.*—Ballentine v. North. Mo. Railroad, 40 Mo. 491, 93 Am. Dec. 315 (1867).

*Nebraska.*—Chicago, etc., R. R. v. Williams, 61 Neb. 608, 85 N. W. 832 (1901); Atchison, etc., R. v. Washburn, 5 Neb. 117 (1876).

*New Hampshire.*—Rixford v. Smith, 52 N. H. 355, 13 Am. Rep. 42 (1872).

*New York.*—Clarke v. Rochester & S. R. R., 14 N. Y. 570, 67 Am. Dec. 205 (1856).

*North Carolina.*—Lee v. Raleigh & G. R. R., 72 N. C. 236 (1875).

*Ohio.*—Welsh v. Pittsburg, Ft. W. & C. R. R., 10 Oh. St. 65, 75 Am. Dec. 490 (1859).

*Pennsylvania.*—Ritz v. Penna. R. Co., 3 Phila. 82, 15 Leg. Int. 75 (1858).

*South Carolina.*—Bamberg v. So. Carolina R., 9 S. C. 61, 30 Am. Rep. 13 (1877).

*Tennessee.*—Nashville & C. Railroad Co. v. Jackson, 6 Heisk. 271 (1871).

*Texas.*—Missouri Pac. Ry. Co. v. Harris, 67 Texas, 166 (1886).

*Vermont.*—Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567 (1854).

*Wisconsin.*—Betts v. Farmers' Loan Co., 21 Wis. 80 (1866); Ayres v. Railroad Co., 71 Wis. 372, 5 Am. Rep. 226 (1888).

*England.*—Hodgman v. West Midland R. Co., 5 B. & S. 173, 117 E. C. L. 173, 13 W. R. 758, 35 L. J. Q. B. 85 (1865).

[1] The quotation which follows is from Kansas Pacific Ry. Co. v. Nichols, 9 Kans. 235, 12 Am. Rep. 494 (1872).

accept for transportation every kind of freight in every form that is appropriate for transportation is well brought out by the case of rolling stock offered for transportation as freight. As is said by a Canadian court [1] such transportation comes within the general profession of the railroads which "hold themselves out as carriers of all descriptions of property capable of being reasonably and conveniently transported over rails by a locomotive engine, to the extent to which they have the means and accommodations." These cases only decide that cars must be received as freight, being charged for as such.[2] They do not go so far as to decide whether freight offered in freight cars must be so received and transported without charge for the weight of the car, a question much discussed later.

**§ 258. Profession limited to car service.**

To go to the other extreme of this problem, there is the railway service which the terminal railway provides. These railways not only undertake the carriage of freight exclusively, but often will only take that when offered in loaded cars. The profession of such a road, indeed, is exclusively to transfer loaded cars to and from railway systems. In recognizing this situation the Illinois court [3] said: "Nor do we see anything in the objection that the business of the company is to be limited to the carrying of freight offered in cars only. Every common carrier has the right to determine what particular line of business he will follow. If he elects to carry freight only, he will be under no obligations to carry passengers, and *vice*

[1] Greene v. St. John & M. Ry. Co., 22 N. B. (P. & T.) 252 (1882).

[2] See further Rogers Locomotive & M. Wks. v. Erie R. R. Co., 20 N. J. Eq. 379 (1869).

[3] Wiggins Ferry Co. v. East St. Louis Union Ry. Co., 107 Ill. 450, 458 (1883).

*versa*. So if he holds himself out as a carrier of a particular kind of freight, or of freight generally, prepared for carriage in a particular way, he will only be bound to carry to the extent and in the manner proposed. He will nevertheless be a common carrier." [1]

**§ 259. Extraordinary service in transporting freight.**

In another interesting set of modern cases the recurring contention that in hauling circus trains the railroads should be held liable as common carriers, has always been denied by the courts. The usual facts, however, really negative carriage, the arrangement commonly made leaving the real control of the contents of the circus cars with the circus men, the railroad simply furnishing haulage.[2] As the Michigan court said of such an arrangement in the leading case: [3] "The contract before us involves very few things ordinarily undertaken by carriers. The trains were to be made up entirely of cars which belonged to plaintiff and which the defendant

[1] See further as to such exclusive service: Interstate Stockyards Co. v. Indianapolis Ry. Co., 99 Fed. 472, 481 (1900); United States v. Sioux City Stockyards Co., 162 Fed. 556 (1908).

[2] *United States*.—Chicago, M. & St. P. R. R. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161 (1895); Wilson v. Atlantic C. L. Ry. Co., 129 Fed. 774, aff'd in 133 Fed. 1022, 66 C. C. A. 486 (1904); Clough v. Grand Trunk Ry. Co., 155 Fed. 81, 85 C. C. A. 1, 11 L. R. A. (N. S.) 446 (1907); Sager v. Northern Pac. Ry. Co., 166 Fed. 526 (1908).

*Indiana*.—Cleveland, C., C. & St. L. Ry. Co. v. Henry, 170 Ind. 94, 83 N. E. 710 (1908).

*Massachusetts*.—Robertson v. Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482 (1892).

*Michigan*.—Coup v. Wabash, St. L. & P. Ry., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374 (1885).

*Pennsylvania*.—Forepaugh v. Delaware, L. & W. R. R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508 (1889).

But see Fordyce v. McFlynn, 56 Ark. 124, 19 S. W. 961 (1892), which is really *contra*. And see Santa Fe P. & P. Ry. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910), which is plainly distinguishable.

[3] Coup v. Wabash, St. L. & P. Ry. Co., *supra*.

neither loaded nor prepared, and into the arrangement of which, and the stowing and placing of their contents defendant had no power to meddle. The cars contained horses which were entirely under control of plaintiff, and which under any circumstances may involve special risks. They contained an elephant, which might very easily involve difficulty, especially in case of accident. They contained wild animals which defendant's men could not handle, and which might also become troublesome and dangerous. It has always been held that it is not incumbent on carriers to assume the burden and risks of such carriage."

**§ 260. Extraordinary service in delivering freight.**

The decisions generally impose upon the railroad companies an almost universal duty to perform as common carriage every transportation service which may fairly be demanded by the commercial community. Thus, in one interesting class of cases of recent instance it was held that a railroad to meet the needs of those constructing telegraph lines was compelled to run with frequent stops freight trains of flat cars carrying telegraph poles and other equipment, delivering them along the right of way at the regular intervals for setting the poles. In supporting an order of a railroad commission of this tenor, the Florida court [1] said that it would be discrimination for the railroad to perform such a service for the Western Union Telegraph Company, and refuse the same service to the Postal Telegraph-Cable Company: "We think it is clear that a railroad company where it acts as a common carrier is bound to serve all the members of the public alike, who apply for service, under like conditions. The contention that the general order of the Railroad Commissioners is unauthorized by law inasmuch as it applies only to the re-

[1] State v. Atlantic Coast Line R. R. Co., 51 Fla. 543, 41 So. 529, (1906).

spondent, we think is unfounded. In the very nature of things such an order could not be made to apply to another railroad company which had not voluntarily performed for some patron the service described in these proceedings, which is in some respects peculiar, in that it involves the delivery of poles, wires, etc., between stations. But the respondent having voluntarily performed this service for the Western Union Telegraph Company may not deny it to another company applying for similar service under like conditions." [1]

*Topic B. Separable Services for Different Purposes*

**§ 261. Separable services in general.**

Even if one is not committed in public employment to going beyond the general class within which his usual services fall, there is, of course, no reason why one engaged in one class of service may not engage himself in various other classes of service by making express or implied profession of them. It rests with the management to decide whether to engage in two separable services, as a railroad carrier may take passengers or freight. This is particularly plain where the services are plainly diverse, as in one case where a municipality was operating a waterworks and maintaining a sewerage system. Again, it may engage in one upon a public basis while dealing in the other upon a private basis, as a gas company may supply generally for illumination, while making in a few cases special bargains for their surplus as fuel. Or it may undertake one branch solely, as an electric company may refuse to supply current for power. But in all cases, if two separable services are generally offered to the public the applicant must be free to demand either at his election.

[1] Cumberland Tel. & Tel. Co. v. Morgan's L. & T. R. Co., 51 La. Ann. 29, 24 So. 803 (1899).

**§ 262. Carriers of passengers and goods.**

A carrier of passengers is not necessarily also a carrier of goods. His vehicles may not be adapted for that purpose, or he may not desire to carry on both lines of business. Even if he does occasionally carry goods for hire on his vehicles, he is not necessarily a common carrier of goods. This distinction was recognized many times with respect to stagecoaches [1] in the earlier cases. Similarly, one may undertake publicly as a carrier, of freight solely.[2] In this branch he is plainly engaged in a public employment, and even if such a freight carrier does occasionally take passengers, that does not make him a common carrier of them. And conversely if a railway carries passengers regularly but takes freight only for one party it is not a common carrier of freight.[3] So if a street railway company has never made profession to carry anything except passengers, it may not be held liable for goods.[4] Cases may be found, however, where the practice of the railway has been to accept large packages brought by passengers for which they receive addi-

[1] *Connecticut.*—Merwin v. Butler, 17 Conn. 138 (1845).

*Iowa.*—Sales v. Western Stage Co., 4 Iowa, 547 (1857).

*Kentucky.*—Robertson v. Kennedy, 2 Dana, 430, 26 Am. Dec. 466 (1834).

*Massachusetts.* — Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133 (1822).

*New York.*—Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455 (1838); Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470 (1838).

*Ohio.*—Jones v. Voorhees, 10 Oh. St. 145 (1840).

*Pennsylvania.*—Beckman v. Shouse, 5 Rawle, 179, 28 Am. Dec. 653 (1835).

*South Carolina.*—Peixotti v. McLaughlin, 1 Strob. 468, 47 Am. Dec. 563 (1847).

*Tennessee.*—Walker v. Skipwith, Meigs, 502 (1838).

*England.*—Butler v. Basing, 2 Car. & P. 613 (1827).

[2] Wiggins Ferry Co. v. East St. Louis V. Ry. Co., 107 Ill. 450 (1883).

[3] Edgar Lumber Co. v. Cornie Stave Co. (Ark.), 130 S. W. 452 (1910).

[4] *California.*—Davis v. Button, 78 Cal. 247, 20 Pac. 545 (1889).

*Oregon.*—Thompson-Houston Electric Co. v. Simon, 20 Oreg. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86 (1890).

tional compensation. In such cases [1] the courts properly hold that if it has been shown sufficiently that the defendants had assumed the business of common carriers of merchandise upon their cars they would be held liable as such. Of late years the interurban railways have made the carriage of express matter a distinct branch of their business a feature. This is probably the underlying reason for treating them on a different basis from street railways in general.

**§ 263. Divisibility of the innkeeper's undertaking.**

The innkeeper must, as such, supply all the entertainment which the weary traveler actually needs on his journey; which at least is food and shelter,[2] and the innkeeper is bound to supply the traveler with either or both as he may require. The consequence of this dual requirement is curious. If the keeper of a house of entertainment does not undertake to furnish both of these necessities he is not a common innkeeper; and this requirement distinguishes inns from many similar houses of public entertainment. Thus a house which does not supply lodging is not an inn; and this rule excludes from among inns a restaurant or eating house, a coffeehouse or a drinking saloon.[3] And for the same reason a house that

[1] *Illinois.*—Spalding v. Macomb & W. I. Ry. Co., 225 Ill. 585, 80 N. E. 327 (1907).

*Massachusetts.*—Levi v. Lynn & Boston R. R. Co., 11 Allen, 300, 87 Am. Dec. 713 (1865).

[2] *California.*—Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867).

*Connecticut.*—Walling v. Potter, 35 Conn. 183 (1868).

*New York.*—Wintermute v. Clark, 5 Sandf. 242 (1851); Cromwell v. Stephens, 2 Daly, 15 (1867).

*Tennessee.*—Dickerson v. Rogers, 4 Humph. 179, 40 Am. Dec. 642 (1843).

*England.*—Thompson v. Lacy, 3 B. & Ald. 283 (1820).

[3] *Illinois.*—Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483, aff'd 61 Ill. App. 263 (1896).

*New York.*—Block v. Sherry, 43 N. Y. Misc. 342, 87 N. Y. Supp. 160 (1904).

*Ohio.*—Pabe v. Myers, 5 Ohio S. & C. P. Dec. 578 (1895).

furnishes only lodging without food, like a lodging house, or an apartment hotel,[1] is not an inn. However, if all elements of entertainment required by a traveler are furnished him by the host the house may be an inn, notwithstanding they are independently furnished and separately offered. Thus, a hotel is no less an inn though it is conducted on the European plan, so called; the fact that food is separately obtained and paid for, and the guest may procure his food elsewhere if he chooses, does not alter the legal character of the house.[2]

### § 264. Purposes for which water is supplied.

A company engaged in the supplying of water through pipes to the community is not obliged to supply water for all purposes to which the applicant may wish to devote it.

*England.*—Reg. v. Rymer, 2 Q. B. D. 136, 46 L. I. M. C. (N. S.) 108 (1877).

[1] *Massachusetts.*—Davis v. Gay, 141 Mass. 531, 6 N. E. 549 (1886).

*New York.*—Kelly v. New York Excise Comrs., 54 How. Pr. 327 (1877); Cromwell v. Stephens, 2 Daly, 15 (1867).

[2] *Illinois.*—Bullock v. Adair, 63 Ill. App. 30 (1895).

*Minnesota.*—Johnson v. Chadbourn Furnace Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571 (1903).

But see Nelson v. Johnson, 104 Minn. 440, 116 N. W. 828, 17 L. R. A. (N. S.) 1259 (1908).

*New York.*—Krohn v. Sweeney, 2 Daly, 200 (1867).

*Pennsylvania.* — McClure v. Krumbholz, 9 Pa. Dist. R. 544, 31 Pitts. L. J. (N. S.) 3 (1900).

There may be restaurants no part of the inn:

*Kentucky.*—Kisten v. Hildebrand, 9 B. Mon. 72, 48 Am. Dec. 416 (1848).

*Massachusetts.* — Commonwealth v. Wetherbee, 101 Mass. 214 (1869).

*Minnesota.*—Johnson v. Chadbourn Furnace Co., 89 Minn. 310, 94 N. W. 874, 99 Am. St. Rep. 571 (1903).

*New York.*—Kelly v. New York Excise Comrs., 54 How. Pr. 327 (1877).

People resorting to such restaurants are not guests:

*Massachusetts.* — Mason v. Thompson, 9 Pick. 280, 20 Am. Dec. 471 (1830).

*New York.*—Krohn v. Sweeney, 2 Daly, 200 (1867).

*Vermont.*—State v. Stone, 6 Vt. 295 (1834).

*England.*—Reg. v. Rymer, 2 Q. B. D. 136, 46 L. J. M. C. 108 (1877).

*Australia.*—Miller v. Federal Coffee Palace, 15 Victorian Law R. 30 (1889).

This is the explanation of the Vermont case in which it was held that a water company authorized by its charter to take water from a stream to supply a town with water for domestic purposes had no right to conduct water from the stream for the use of a private corporation in polishing granite.[1] It should be added, however, that a water company enabled under its charter, might supply upon a public basis for extraordinary purposes such as to steam plants and manufacturing purposes.[2] What constitutes the domestic service which a community may at least require from the waterworks is not altogether clear, although it has been discussed in certain cases.[3] Aside

[1] Re Barre Water Co., 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195 (1889); and Smith v. Barre Water Co., 73 Vt. 310, 50 Atl. 1055 (1901). See also Jordan v. Indianapolis Water Co. (Ind. App.), 61 N. E. 12 (1901), and Boonton v. United Water Supply Co., 70 N. J. Eq. 692, 64 Atl. 1064 (1906).

[2] *New Jersey.*—Coe v. N. J. Midland Ry. Co., 30 N. J. Eq. 440 (1879).

*Ohio.*—M. E. Church v. Ashtabula Water Co., 20 Oh. C. C. 578 (1900).

*Washington.*—Jenkins v. Columbia Land Co., 13 Wash. 502, 43 Pac. 328 (1896).

[3] In the interesting case of Barnard Castle Urban Dist. v. Wilson, 2 Ch. 813 (1901), the court say:

"It is a serious question whether in every case in which an occupier desires to have a supply of water for his enjoyment and pleasure the water company or authority are bound to supply him without regard to the ordinary requirements of their district for the purposes of drinking, washing, and sanitation. Let me give an example of what I mean. I agree that a householder might allow his dog or cat to drink the water supplied for domestic purposes and might use the water for washing them. So again, as has been decided, he might use the water for washing his horse and carriage and for watering the horse. There must, however, be some limitation. Suppose a wealthy proprietor chose to keep other tame animals—for instance, a tame elephant—would it be reasonable for him to call upon a water company to supply him with water to fill a special bath for the elephant? In my opinion that would not be a supply for domestic purposes. So again, it might be reasonable to use the water to fill a small tank for gold-fish. But suppose an occupier desired to keep a private aquarium, I should not be inclined to hold that he could require a water company to furnish him with a supply of running water for it. In my opinion you must approach the consideration of

from these duties which it owes to the inhabitants as individuals it would seem that the local works are under certain obligations to the community itself, such as to supply water for the extinguishment of fires and the sprinkling of streets.[1]

**§ 265. Gas for illumination and for fuel.**

A gas company within the principles under discussion if authorized by its charter may offer to the public a gas supply for both illumination or fuel, or it may confine its profession or be limited by its charter to the supply of gas for either illumination or fuel.[2] Where the company offers both services it must be in the alternative, the consumer having the right to demand either service which he wishes without obligation to take the other.[3] The whole problem was gone over in a recent case where it was proved that the gas company was engaged under its charter in supplying gas both for illumination and fuel with the arrangement that the illuminating gas and the

each case with some regard to what is reasonable, and see in each case whether the supply of water which is wanted is reasonably a supply for domestic purposes."

[1] As to the duty to the community in relation to hydrant service, see:

*Iowa.*—McAllan v. Hamblin, 129 Iowa, 329, 105 N. W. 593, 5 L. R. A. (N. S.) 434 (1906).

*Texas.*—House v. Houston Water Works Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532 (1895).

Moreover, there is a particular duty to individual owners to supply water for their extinguishing arrangements at a proper rate therefor. Gordon & Ferguson v. Doran, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049 (1907).

As to the duty to the community for sprinkling service, see:

*United States.*—Wiemer v. Louisville Water Co., 130 Fed. Rep. 251 (1903).

*Louisiana.*—Callery v. Water Works Co., 35 La. Ann. 798 (1883).

Similarly as to private supply to sprinkling, see:

*Alabama.*—City of Birmingham v. Birmingham Waterworks Co., 42 So. 10 (1906).

*Tennessee.*—Wautauga Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897).

[2] The cases have already been cited that relate to the supply of gas for illumination (see § 111) and for fuel (see § 112).

[3] See Baily v. Fayette Gas Co., 193 Pa. St. 175, 44 Atl. 251 (1899).

fuel gas should be taken through a separate meter as different charges were made. In this particular case the applicant who had a single meter through which he had formerly taken illuminating gas now wished to take fuel gas exclusively, which the Louisiana court [1] held he could do. "No good reason suggests itself why mandamus should not go to the company, when it is evident that the one who desires to use gas is entitled to the light for which he seeks, or to the heat he needs for cooking and other purposes for which gas is utilized." [2]

**§ 266. Distinct kinds of telephone service.**

As the modern telephone system is managed, two services are generally offered, a special service to occupiers at their buildings and a general service at pay stations. In some few cases the telephone companies have attempted to say that if they furnish the pay stations to the public in general, they should not be bound to furnish a residence service to particular persons unless they chose. In the important case of State v. Nebraska Telephone Company [3] this was one excuse urged by the company when a mandamus was sought against it to compel it to put a tele-

[1] Quoted from State v. New Orleans Gaslight Co., 108 La. 67, 32 So. 179 (1901-1902).

Whether such lower rates for fuel gas are justifiable is a debated question discussed later on. But certainly People's Gaslight Co. v. Hale, 94 Ill. App. 406 (1900), is correct in holding that a gas company is not bound to continue to furnish gas, for fuel, cheaper.

[2] One point not covered by these cases, and, indeed, not settled as yet, is whether a company which is limited to one service can be prevented from bringing about another service. One recent case holds that an illuminating company is not to blame if consumers use its gas for fuel:

People v. Los Angeles Independent Gas Co., 150 Cal. 557, 89 Pac. 108 (1907).

Another holds that a fuel company can be prevented from selling gas which its customers use for lighting:

Nairin v. Ky. Heating Co., 27 Ky. L. Rep. 551, 86 S. W. 676 (1900).

[3] 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885).

phone into the relator's office, but the court held that as the special service was generally offered, this particular applicant must be given it, Mr. Justice Reese saying: "It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there. That, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations, that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send despatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public." [1]

*Topic C. Profession Defined by its Physical Limitations*

**§ 267. Profession to devote facilities.**

The limits one may impose upon the profession he makes in undertaking the employment are far easier to indicate in general terms than to apply in particular cases. One way of putting it is to say that one may set the exterior limits, but one may make no interior limits; or in other

[1] Other important cases to the same effect should be noted:

*Indiana.*—Central Union Telephone Co. v. State, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114 (1888); Central Union Telephone Co. v. Fehring, 146 Ind. 189, 45 N. E. 64 (1896); Central Union Telephone Co. v. State, 123 Ind. 113, 24 N. E. 215 (1889).

*Missouri.*—State ex rel. v. Kinloch Telephone Co., 93 Mo. App. 349, 67 S. W. 684 (1902).

words, one is not bound to service outside of the profession which has been made, while one is bound to serve within the profession. This distinction may be illustrated by pointing out that a railroad is not bound to carry beyond the route which it has established; but it cannot limit its service to white men by expressly advertising that it will not take colored persons. And similarly a water company need not supply applicants outside the city even if its aqueducts pass their premises, but certainly it could not within the city refuse to supply applicants in a district through which its pipes run. This is perhaps sufficiently plain in both illustrations given; but other cases are more difficult to bring within these principles. An innkeeper is not bound to serve beyond the capacity of his house, but up to this capacity he ought to receive all without discrimination; an irrigation company is not liable for not supplying new applicants after the flow of the stream is exhausted, although bound to accept applicants in proper order up to its capacity. Perhaps in these cases also it may fairly be said that the extent of the innkeeper's profession is the dedication of his actual house to public service, and the whole profession of the irrigation company is to divert the particular stream; so that neither can be called upon to serve beyond its profession, while within its profession its public duty is plain. This conception, however, must not be pressed too far, as other cases will show.

**§ 268. Profession to render service.**

It is apparently equally well established that a railroad company which finds itself unable to handle its business with its original equipment must provide additional equipment to meet existing demands; indeed it must be prepared with better equipment to meet modern needs. So too, a gas works cannot confine its service to its orig-

inal works; it will be obliged to increase its plant to meet the increasing demands of its public. This difference in obligation can only be explained by a difference in the profession, for the circumstances are otherwise much the same. The extent of the profession depends on the intention of the proprietors or, rather, upon the impression which they give their community. In the case of the railroad it is obvious that they intend to give general service, not to simply devote certain cars to that service. They expect to carry goods long after these particular cars have worn out, and their right of way being capable of handling far more business than the original equipment, they expect to add to this as their business grows. The same argument will explain the obvious obligation of the proprietors of a gas plant. Their original franchise is taken upon the basis of a general obligation to serve the community. Their present plant is for present needs; but they really undertake to provide a larger one if the community demands it.

**§ 269. Obligation limited to existing premises.**

Although it is well settled that an innkeeper, a warehouseman, an elevator man, and a wharfinger—to cite prominent examples—are by entering upon indiscriminate dealings bound to serve all to the extent of their capacity, it seems to be equally well established that they have an excuse for refusing further service after their capacity is exhausted. "No doubt an innkeeper is bound to provide accommodation for travellers, but he is not to do so at all risks and all costs. He is only bound to provide accommodation so long as his house is not full; when it is full he has no duty in that respect."[1] Nor is there any intimation in any case that such owners are obliged to build larger

[1] Per Darling, J., in Brown v. Brandt, 1 K. B. 696, 71 L. J. K. B. 367, 86 L. T. 625, 50 W. R. 654. (1902).

structures so as to have greater capacity, even where repeated experience has shown the existing buildings to be entirely inadequate to existing demands upon them. These instances constitute too large a class to be dismissed as exceptional. The truth of the matter seems to be that in these cases it is the existing structure which is devoted to public service and that is all that is understood as offered to the public.

**§ 270. Profession limited to original plant.**

In some services the profession made is limited to the original equipment. This, as has been seen, was certainly the old law, when modern conditions were not anticipated. Thus a carter is held to put his wagon at the disposal of the public for what it will take. In the leading case,[1] a carter who usually carried parcels of moderate size, but who had taken a hogshead of molasses after first refusing it because of its size, was held not responsible for it as a common carrier. "There seems to be good reason," said the court, "for distinguishing between this and other kind of goods, on account of its bulk and weight, and it also appears that the defendant's cart is too small for such freight." In a modern case of this sort it was pointed out that a steamship owner is not liable for refusing to take freight when the vessel which he had devoted to this service was loaded to its full capacity.[2] "At common law, a carrier's duty to receive goods was limited to his facilities for transportation," said the court. In the same way a bridge company cannot be called upon to receive loads too heavy for its structure.[3] And a company which held itself out as ready

[1] Tunnel v. Pettijohn, 2 Harr. (Del.) 48 (1836).

[2] Ocean Steamship Co. v. Savannah, L. W. & S. Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867 (1909).

[3] Thompson v. Matthews, 2 Edw. Ch. 212 (1834).

to carry anything its barges were suited for was thought to be a common carrier.[1]

**§ 271. Profession limited to natural supply.**

Where the supply that is offered has a natural limitation, it will usually be found that the profession is limited to the exploitation of that supply. Thus a company which undertakes the supply of natural gas from a given field cannot be held liable for the failure of the supply to meet the demands of the community; for to require such a company to manufacture gas to meet the deficiency would call upon it to go into a very different business.[2] And so apparently a hydro-electric development company which professes no more than the transformation of a certain water power into electric energy could not be compelled to put in an auxiliary steam plant.[3]

**§ 272. Carriage confined to established route.**

The obligation of a common carrier is no wider than his undertaking indicates to the public. Thus it has always been recognized that a carrier's obligation was confined to the route which he had established. This is not only true of carters who have an established route, but of teamsters who have an established territory.[4] There is no danger if a wagoner is held to be a common carrier, as one early American case feared, that he could be compelled to load for any part of the continent.[5] A line of steamboats is not obliged at request to deviate to deliver cargo elsewhere than its usual ports of call.

[1] Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575 (1904).

[2] Indiana Nat. Gas & O. Co. v. State, 162 Ind. 690, 71 N. E. 133 (1904).

[3] See Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472 (1905).

[4] Farley v. Lavary, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383 (1900).

[5] Gordon v. Hutchinson, 1 W. & S. (Pa.) 285, 37 Am. Dec. 464 (1841).

If this is true of those carriers which may roam at will, how much more must it be true of those carriers whose route is fixed, such as railway companies and canal boatmen. Upon this general theory a railroad's obligation to receive freight is for transportation over its own route only. The fact that it has connections with other routes makes no difference; it is not bound to provide any other mode of transportation than its own. Therefore it need not furnish means to carry merchandise over other routes.[1] And certainly it need not send cars to fetch freight from other routes. Thus it need not even provide equipment for taking freight from the sidings of other railways very near to its route but not really upon it.[2]

*Topic D. Territorial Limits upon the Service Professed*

**§ 273. General problem of community service.**

In various important public services the obligation undertaken is to serve the community in general. It is obvious that this problem may be dealt with from two general points of view. One side is the exterior limitations beyond which the service need not be rendered; the other regards the obligation to render service within these limits. Thus, a gas company may not be called upon to serve beyond the municipality for which it has been chartered; but must it lay its pipes through every street in that city? So a water supply cannot be demanded by a farmer in an outlying community although the aqueduct passes his door, but the moment the city limits are reached must not any abutting owner be supplied? There

[1] *Indiana.*—Pittsburg, C. & St. L. Ry. v. Morton, 61 Ind. 539, 28 Am. Repr. 682 (1878).

*Kentucky.*—Pittsburg, C., C. & St. L. Ry. Co. v. Viers, 113 Ky. 526, 68 S. W. 469 (1902).

[2] Hoyt v. Chicago, B. & Q. R. R. Co., 93 Ill. 601 (1879); People v. Chicago & A. R. R. Co., 55 Ill. 95, 8 Am. Rep. 631 (1870).

are cases on these points as will be seen presently; and yet as to the full extent of this obligation, the law is still in the making. When the particular services are separately considered the law will seem too indefinite to be practicable; but when all the cases are taken together and all are considered as one problem of public service, working rules may be attained, even in the present stage of development of the law. As the law now stands there are various cases as to the supply of water [1] and gas,[2] and the installation of electricity [3] and telephone,[4] but hardly enough as

[1] The principal cases as to the district within which water supply must be extended are:

*Connecticut.*—Town of West Hartford v. Board of Water Commissioners, 68 Conn. 323, 36 Atl. 786 (1896).

*Idaho.*—Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518 (1900).

*Illinois.*—Rogers Park Water Co. v. Chicago, 131 Ill. App. 35 (1907).

*Iowa.*—Independent Sch. Dist. v. Le Mars Water & Light Co., 131 Iowa, 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859 (1906).

*Kansas.*—City of Topeka v. Topeka Water Co., 58 Kans. 349, 49 Pac. 79 (1897).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

*Pennsylvania.*—Hyndman Water Co. v. Borough of Hyndman, 7 Pa. Super. Ct. 191 (1898).

[2] The principal cases as to the district to which gas supply must be extended are:

*Indiana.*—Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321 (1892).

*New Jersey.*—Borough of Madison v. Morristown Gaslight Co., 65 N. J. Eq. 356, 54 Atl. 439 (1903).

*New York.*—Jones v. Rochester Gas & Electric Co., 7 N. Y. App. Div. 465, 39 N. Y. Supp. 1105 (1896).

*Pennsylvania.*—Corbet v. Oil City Fuel Supply Co., 21 Pa. Super. Ct. 80 (1902).

*West Virginia.*—Charleston Nat. Gas Co. v. Lowe & B., 52 W. Va. 662, 44 S. E. 410 (1901).

*Wisconsin.*—Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 70 Am. Dec. 479 (1858).

[3] The principal cases as to the district within which electricity must be supplied are:

*Illinois.*—City of Chicago v. Mutual Electric Light & Power Co., 55 Ill. App. 429 (1894).

*Massachusetts.*—Weld v. Gas & Electric Light Commissioners, 197 Mass. 556, 84 N. E. 101 (1908).

*New York.*—Moore v. Champlain Electric Co., 88 N. Y. App. Div. 289, 85 N. Y. Supp. 37 (1903).

[4] The principal cases as to the district within which telephone installation is obligatory are:

to any one as to make workable law, while there are certain similar community services such as sewerage and irrigation as to which there are hardly any cases at all, to say nothing of ticker service and messenger calls, steam heat and refrigeration. In this situation the peculiar advantages of treating the public services as one class governed by a general law is manifest.

**§ 274. Territorial limits fixed by franchise.**

In the first place it is necessary to determine the exterior limits of the territory served. Usually this will be settled either by the extent of the powers of the company given in its charter or by the limits of the franchise granted. For a public service company cannot be required to act *ultra vires* by serving outside the territory described in its charter, nor can it be asked to act illegally by going into territory to which its franchise does not extend. This problem almost invariably reduces itself to a question of construction. Thus, to compare two recent New Jersey cases,[1] a charter to supply a certain municipality and its "vicinity" does not include an independent municipality several miles distant; but a charter to extend the service to any "neighboring city" authorizes a supply at a considerable distance. It should be added that in the case of a service conducted by a municipality the inclination is to be peculiarly strict, as the taxpayer's money ought not to be risked in the service of people outside; but this is also in the hands of the legislature, the question being as to its

*United States.*—Cumberland Telephone Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268 (1908).

*Kansas.*—Crouch v. Arnett, 71 Kans. 49, 79 Pac. 1086 (1905).

*Nebraska.*—State ex rel. v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885).

*Pennsylvania.*—Central D. & P. Telegraph Co. v. Commonwealth, 114 Pa. St. 592, 7 Atl. 926 (1886).

[1] Madison v. Morristown Gaslight Co., 65 N. J. Eq. 356, 54 Atl. 439 (1903), and Millville Improvement Co. v. Pitman G. & C. Gas Co., 75 N. J. L. 410, 67 Atl. 1005 (1907).

intention.[1] All this will be true no matter how small the distance outside the designated limits may be; the applicant cannot demand that the service company shall cross its boundaries. And the limitation holds unless exception is made even if the company's mains pass the applicant's premises in outlying territory on their way to the community served.[2] This will of course be otherwise if in accepting the franchise granted the particular company makes profession to supply along the mains in territory outside, expressly or impliedly.[3]

**§ 275. Change in municipal boundaries.**

Various problems of practical importance arise when there is a subsequent change in the boundaries of the municipalities to which the original grants apply. It is properly held that the franchises applying to territory annexed remain in force; and the existing companies should lose no rights by such changes. In accordance with this principle it was held in New York[4] that the incorporation of part of a town in which a franchise had been granted in another village did not affect the franchises of the company in the territory annexed; and the village government must therefore respect them. Nor should the company in the annexed territory be involved in service outside the former limits. But as to the company generally empowered to serve the annexing city the case

[1] *Massachusetts.*—Inhabitants of Quincy v. Boston, 148 Mass. 389, 19 N. E. 519 (1889).

*England.*—Pudsey Coal Gas Co. v. Bradford, L. R. 15 Eq. 167 (1873).

[2] *New York.*—City of Rochester v. Rochester & L. O. Water Co., 189 N. Y. 323, 82 N. E. 154 (1907).

*West Virginia.*—Gas Co. v. Lowe & Bulter, 52 W. Va. 662, 44 S. E. 410 (1901).

[3] *Connecticut.*—Town of West Hartford v. Board of Water Commissioners, 68 Conn. 323, 36 Atl. 786 (1896).

*Maine.*—Mayo v. Village Fire Co., 96 Me. 539, 53 Atl. 62 (1902).

[4] People ex rel. Woodhaven Gas Co. v. Deehan, 153 N. Y. 528, 47 N. E. 787 (1897).

may be different by proper construction. If outlying districts are subsequently incorporated into the municipality within which the franchise runs it will generally be held to be now included for this purpose. Thus it is held in an Alabama case [1] that persons who resided beyond the city limits when the contract was made but who were subsequently brought in by an extension of the corporate limits, are entitled to the franchise rates. But if the incorporated territory constitutes a distinct community no obligation to serve should result.

**§ 276. Obligation beyond the profession.**

In most of the cases under this topic a general profession to serve the whole community will be found either expressly or by implication. Where, however, no such profession can be found for defining the territory served, the company cannot upon general principles be held to do more than serve the district which their present service shows them to be engaged in serving upon a public basis. A late Kansas case [2] so involves this side of the problem with the other that it is worth full discussion. The decision was that the telephone company was not obliged to continue to serve a householder who was just outside the municipal limits and but a few feet from its pole line, although he had been given service and others at certain points outside were still given service. The reasons for this decision are thus stated by Mr. Justice Smith: "If Mr. Crouch had resided in the city, his rights would have been clear. Being outside, a question of fact was presented whether in removing his instrument a discrimination was practiced on him—a right infringed which he enjoyed in common with others situated similarly.

[1] Mayor, etc., City of Birmingham v. Birmingham Water Co. (Ala.), 42 So. 10 (1906).

[2] Crouch v. Arnett, 71 Kan. 49, 79 Pac. 1086 (1905).

A telephone company operating wholly within the corporate limits of a city could not be compelled to supply instruments to residents beyond the boundaries of the town, and make connections therewith. In this instance it did serve patrons outside of Iola, but the disputed question was whether Mr. Crouch, by reason of proximity and other conditions, was entitled to equal rights with them. This was to be determined from the testimony of witnesses, and was peculiarly within the province of the trial court."[1]

**§ 277. Establishment of delivery limits.**

There are certain services in which the company undertakes delivery within a community,—express matter and telegraph messages are prominent examples of this. An express company[2] by its general profession makes it part of its business to get parcels from the sender's premises and to deliver these parcels to the person addressed. Without this wider profession, the express company could not be called upon to perform this service any more than any other carrier. Whatever limits they may establish within which they will call for and deliver parcels will be the measure of their undertaking in this respect. In the same way telegraph companies[3] undertake some-

[1] Consistent with this is a recent Massachusetts case that where an electric company formally announces its withdrawal from an outlying district it is not thereafter bound to supply people within it. Weld v. Gas & Electric Commissioners, 197 Mass. 556, 84 N. E. 101 (1908).

[2] The leading case on this point is Bullard v. American Express Co., 107 Mich. 695, 65 N. W. 551, 33 L. R. A. 66, 61 Am. St. Rep. 358. As is intimated in the text the common-law duty of express companies to make free delivery of parcels committed to their care is not such as to preclude them from fixing charges when they do not make such deliveries, and requiring consignees to pay for making a personal delivery to them. See State ex rel. Railroad Commission v. Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A. (N. S.) 93 (1908).

[3] The leading case on this point is

times to go for messages upon call, and almost always to make personal delivery of messages to the addressees. Even this would not be so without this general profession. Telephone companies compel casual patrons to come to the pay stations themselves. Here again the company may establish limits within which they will go and deliver, and this undertaking of the company will govern unless they make some special limitation of an outrageous nature. In both services to a very considerable extent all this is a question of the practice of the company in the localities in question which may be shown either by their express regulations or by their usual custom.

**§ 278. What limits are reasonable.**

The delivery limits must be reasonably large, which means that all the surrounding circumstances must be taken into account. This problem, like most other questions of public service can come up in one of two ways. If it is a question of the validity of the legislation fixing the delivery limits, the question will be whether the requirement is so beyond existing demand as to be really outrageous. Thus, in one leading case [1] of this sort it is held that a statute of Indiana requiring personal delivery of express matter to all persons to whom the same should be addressed living within the corporation limits of cities within the State having a population of twenty-five hundred or more inhabitants does not work unconstitutional

Western Union Telegraph Co. v. Trotter, 55 Ill. App. 659 (1894).

According to the weight of authority of where a telegraph company has established free-delivery limits, notice of which is given on its blanks, and a message is handed in for transmission without explanation, the presumption is the receiver lives within the free-delivery limits, and the sender takes risk of delivery, unless he arranges for delivery at a greater distance. See Western Union Tel. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148 (1889).

[1] United States Express Co. v. State, 164 Ind. 196, 73 N. E. 101 (1905).

*Kentucky.*—See Western Union Telegraph Co. v. Scott, 27 Ky. L. Rep. 975, 87 S. W. 289 (1903).

deprivation of liberty or property. But if it is a question whether the delivery limits which the company has fixed are too restricted, then the court will hold that this regulation of the company should not be overruled unless it is shown to be really unreasonable. Thus a rule of a telegraph company making the delivery limit for a town of less than five thousand inhabitants one half a mile from the office was held reasonable.[1] Of course there may be particular instances where the company cannot insist upon its established limits, as where it does not generally observe them.[2] And there may be towns with so small a population as to not support any delivery service from the office.[3] But these are questions to be discussed later.

**§ 279. Individual installation within the territory.**

These are largely negative principles which have just been stated; and although service is not required outside the territorial limits thus defined, it does not follow that service is owed to all applicants within those territorial limits. Where no individual installation is requisite there is naturally no special problem, for it is practically as easy to deliver express packages or telegraph messages at one house as at another within the territory served; but where special installation is necessary, as laying gas pipes or stringing electric wires, a very difficult problem arises not as yet solved. If one could believe a recent Idaho case[4] the problem would be settled. That case held

[1] Western Union Telegraph Co. v. Trotter, 55 Ill. App. 659 (1894).

See also:

*Georgia.*—Moore v. Western Union Telegraph Co., 87 Ga. 613, 13 S. E. 639 (1891).

[2] *South Carolina.*—Hellams v. Western Union Telegraph Co., 70 S. C. 83, 49 S. E. 12 (1904).

*Texas.*—Western Union Telegraph Co. v. Swearingen, 95 Tex. 420, 67 S. W. 767 (1902).

[3] *North Carolina.*—Gainey v. Telegraph Co., 136 N. C. 261, 48 S. E. 653 (1904).

[4] Bothwell v. Consumers' Co., 13 Idaho, 568, 92 Pac. 533, 24 L. R. A. (N. S.) 485 (1907). See further

that such a company as a water company with a special franchise to supply a given community is "under a public duty to supply water to all living within the franchise limits on payment of the established rates. It owes this duty to every one so long as it has water to sell, whether he be on its main or at a great distance therefrom." [1]

**§ 280. Rights of abutting owners.**

On the contrary all that can be stated with entire certainty is that service may be demanded at all premises within the territorial limits that are adjacent to the lines of supply established for that purpose.[2] Almost all the cases in the books in which this problem of individual service is involved thus far are cases of refusal to supply those who have premises abutting upon the street through which the main lines of supply run; and although this fact is adverted to in many of them the obligation to serve the community usually appears as the basal argument without regard to that accidental fact. This rule that all those occupying premises upon the existing mains must be served should not be taken too literally, for it does not follow that a great aqueduct entering the city must be tapped for a single applicant in the outskirts of

Pocatello Water Co. v. Standley, 7 Ida. 155, 61 Pac. 518 (1900).

[1] Going too far to the opposite extreme is the case which suggests that a telephone company is never bound to construct a new line against its will. Hockett v. State, 105 Ind. 250, 599, 5 N. E. 202, 250 (1885).

[2] In the following cases this point is emphasized:

*Indiana.*—Portland Nat. Gas & Oil Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639 (1893).

*Iowa.*—Independent School District v. Le Mars City Water & Light Co., 131 Iowa, 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859 (1906).

*North Carolina.*—Griffin v. Goldsboro Water Co., 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240 (1898).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

*Pennsylvania.* — Commonwealth v. Wilkes-Barre Gas Co., 2 Kulp, 499 (1883).

*Wisconsin.*—Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 70 Am. Dec. 479 (1858).

the community, or a high current for street lighting transformed for domestic purposes.[1] Even at those premises abutting upon supply lines extraordinary service may not be demanded; very probably a waterworks need not provide sufficient pressure to serve an abnormally high building, nor a gas works lay its service pipes to abutting premises through a solid ledge.

**§ 281. Obligation to the community.**

It is obvious that the problems raised in this topic have not been disposed of as yet. It is plain that the existing facilities must in many instances be further developed in readiness to give service to those beyond the present lines, since what has really been undertaken is the proper service of the whole community dependent upon the established company. This at least involves the well-settled central territory within which service is plainly demanded, whether mains have been laid in all the streets or not. Certainly all premises situated within the network of the existing mains and within convenient connecting distance of their lines should be served.[2] All of these premises come within the sphere of influence, already established, differing slightly from premises abutting. But the law will soon require, if it does not already, that the existing mains must be gradually extended as the growth of population in the community which the corporation has undertaken to serve demands the expansion.[3]

[1] See Moore v. Champlain Electric Co., 88 N. Y. App. Div. 289, 85 N. Y. Supp. 37 (1903).

But see Whitehouse v. Staten Island Water Co., 91 N. Y. Supp. 544, 101 N. Y. App. Div. 112 (1905).

[2] See on this branch of the problem:

*New York.*—Jones v. Rochester Gas & Electric Co., 7 N. Y. App. Div. 465, 39 N. Y. Supp. 1105 (1896).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

[3] See on this branch of the problem:

*Kansas.*—City of Topeka v. To-

**§ 282. Reasonable limitations upon expansion.**

All that has been laid down here must be qualified as in a recent New Jersey case [1] dealing with gas supply where it is said, "In short, is not the obligation to supply a dwelling or tenement with gas, and for that purpose to lay down a supply pipe and set a meter subject to the limitation, that there shall exist a reasonable expectation that the consumption of gas shall be sufficient to warrant the necessary preliminary expenditure?" As this is a relative test it will be seen why comparatively little has to be assured when it is the question of going a few feet off the established mains; the usual consumption of the average customer would secure that. But installation for a single person at some distance from the established mains would not be obligatory in ordinary conditions.[2] Following out the general principle still further, the building of a few houses would call for the extension of a main a little further along a street. But a great deal of business must be shown in order to establish certainly the present obligation to construct new lines into outlying territory. The undertaking to serve a community does not, therefore, lay the company open to outrageous demands in individual cases, but to such service as the community considered as a whole may demand.

peka Water Co., 58 Kans. 349, 49 Pac. 79 (1897).

*Pennsylvania.*—Hyndman Water Co. v. Borough of Hyndman, 7 Pa. Super. Ct. (1898).

[1] Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482 (1904).

[2] See, further, Inhabitants of Quincy v. Boston, 148 Mass. 389, 19 N. E. 519 (1889).

# CHAPTER IX

## WITHDRAWAL FROM PUBLIC EMPLOYMENT

§ 290. Elements of the problem.

*Topic A. Possibility of Total Withdrawal*

§ 291. Closing an inn.
292. Discontinuing a ferry.
293. Making a warehouse private.
294. Withdrawing a wharf from public use.
295. Giving up common carriage.
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297. Shutting off water supply.
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299. Duty devolved upon municipality.
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*Topic B. Abandonment of a Certain District*

§ 303. Right to withdraw from particular district.
304. Doctrine applies only to constructed portions.
305. Discontinuance by public permission.
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307. Cases permitting partial withdrawal.
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310. Service demanded by charter.
311. Partial withdrawal generally permitted.
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*Topic D. Reasonable Notice of Withdrawal*

§ 314. Notice of withdrawal necessary.
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316. Situation requires reasonable notice.

§ 317. What constitutes reasonable notice
318 Substituting one service for another
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320 Division of territory served

## § 290. Elements of the problem.

It has been seen that one comes into public service only by voluntarily engaging in the particular business upon a public basis; and it would seem to follow that one could get out of public employment simply by publicly withdrawing his original profession. It would seem to us to be intolerable if a man who happened to possess convenient facilities were obliged to serve the public if he had never undertaken to do so; and it would be equally oppressive if a man were obliged to continue in the service of the public after he had announced his permanent withdrawal from the employment. And yet the problem is not altogether as simple as it seems. What has been said may satisfactorily dispose of the ultimate right to abandon the whole undertaking; but may this be done without reasonable notice to the trusting public? Moreover, the solution of the problem of total abandonment does not settle the case of partial withdrawal by one remaining otherwise in public employment from a part of the territory served or from a branch of the service offered. It may be this can be done under proper conditions, but certainly it is a matter which requires serious consideration. As the authorities on this most important question are few, full discussion of the cases seems necessary.

### *Topic A. Possibility of Total Withdrawal*

## § 291. Closing an inn.

It has been agreed from ancient times that an innkeeper may withdraw from his business whenever he feels so inclined. In one early case[1] it is said that "an

[1] Rex v. Collins, Palmer, 373 (1633).

innkeeper may at his pleasure demolish his sign and leave off innkeeping." And in a modern case [1] it was intimated that after a sale of his business the former innkeeper would not be under any further duty. "True, the hotel went by the same name; but it is common to keep the same name even though the proprietors change."

**§ 292. Discontinuing a ferry.**

Similar in character are the decisions recognizing the right of a ferryman to abandon his profession. In one extraordinary case [2] a ferryman was at first convicted for "wholly discontinuing the public ferry he had previously kept for the convenience of setting over from Shirley to City Point persons, carriages, chairs and horses." But by the upper court the judgment was reversed upon the ground that: "The discontinuance is the penalty which the law attaches to the failure of the ferryman to exercise his privilege of keeping the ferry; and there is no law which makes the discontinuance an offence."

**§ 293. Making a warehouse private.**

In the leading case as to the public duties of elevator men, Munn v. Illinois,[3] it is recognized in the paragraph most often quoted that just as one gets himself into public business by devoting his property to public service, so he may withdraw himself from public service by voluntary retraction. "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must be subject to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing

[1] Conklin v. Prospect Park Hotel Co., 1 N. Y. Supp. 406, 48 Hun, 619 (1888).

[2] Carter v. The Commonwealth, 2 Va. Cas. 334 (1823).

[3] Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876).

the use, but so long as he maintains the use, he must submit to the control." [1]

**§ 294. Withdrawing a wharf from public use.**

In a late case in the Supreme Court of the United States this distinction in Munn v. Illinois [2] was emphasized further. Certain parties were endeavoring to make perpetual the use of the wharves in question which they had formerly enjoyed in common with the rest of the public. They relied upon the doctrine of Munn v. Illinois, to show that the public had acquired an interest in that use. But the Court said: [3] "The right to use the property has been withdrawn by the owner as to the public in general, including defendant. The only question is whether a third person has the right to use a private wharf on tendering reasonable compensation therefor, because there is no other wharf at the place, or because it would be more convenient to such third person to so use it or because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use. There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held."

**§ 295. Giving up common carriage.**

It is also clear from early authorities that a person who has once engaged in common carriage may withdraw from that public employment and may thereafter engage

[1] See also the language in the following cases dealing with warehouses:

*Kentucky.*—Nash v. Page, 80 Ky. 539, 44 Am. Rep. 490 (1882).

*Virginia.*—Glass v. Davis, 23 Gratt. 184 (1873).

[2] 94 U. S. 113, 24 L. ed. 77 (1876).

[3] Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. 661 (1909).

in private carriage without being held liable as a common carrier. In the leading case of this sort the New York Superior Court [1] said: "The defendant stood upon the same footing as though he had never been engaged in the forwarding business. He had abandoned it entirely certainly one year, and, according to the weight of evidence, four years previous to this transaction. He makes a special contract with Dows to bring goods for him from Albany, and gives his teamster express instruction to bring goods for no one else. He was acting under a special contract and not in the capacity of a common carrier." [2]

**§ 296. Taking up a railway.**

It will have been noted that in the case of the businesses thus far discussed, there has been no question of special obligations by reason of the acceptance from the State of special privileges. In most modern cases it will usually be found that the company in question has some charter obligations to reckon with. It is conceded that so long as any public franchises are exercised public service must be rendered. But even in the case of a railroad company which has accepted extraordinary privileges it would seem that if it is ready to give up its charter it may withdraw from its entire undertaking. In all the cases on this point mandamus to compel the company to resume operations has been refused. It is true that in the actual cases the railroad thus totally abandoned has almost invariably been operated at heavy loss. But then, as several cases point out, their owners do not as a practical matter abandon a profitable railroad; even if those who are conducting it tire of operating it they can sell a profitable railroad to those who will maintain it. "If

[1] Satterlee v. Groat, 1 Wend. 272, (1828).

[2] See also Johnson v. Midland Ry. Co., 4 Exch. at p. 373 (1849).

we are at liberty to suggest on what the legislature very probably relied for the continued operation of a railroad, once constructed, we should say it was the interest of the owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation so as to subserve the public use. If it cannot, we know of no mode by which the State can compel those by whom it was constructed to operate it at a loss, and certainly there is no mode provided by which it can be operated at the risk of the State." [1] In some cases this is developed into a legal explanation. As is said incidentally by the United States Supreme Court: "The question is not as to the existence of the duty, but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains are run at reasonable and moderate fares, and cannot be supported, it is because they are not needed." [2]

**§ 297. Shutting off water supply.**

There are sufficient dicta in the books to the effect that a chartered company even if possessing special privileges may withdraw from its enterprise altogether. The strongest language of this sort is in a recent California case [3] which decides, not inconsistently, that so long as water service is maintained under the franchises held, the whole system must be kept in operation. "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property

[1] Quoted from Coe v. Columbus, P. & I. R. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518 (1859).

See also State v. Dodge City, M. & T. Ry. Co., 53 Kans. 329, 36 Pac. 755, 24 L. R. A. 564, note (1894).

[2] Quoted from No. Pacific Ry. Co. v. Dustin, 142 U. S. 492, 499, 35 L. ed. 1092, 1095, 12 Sup. Ct. 283, 285 (1891).

And see Jack v. Williams, 113 Fed. 823 (1902).

[3] Quoted from Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137 (1907).

and quit the business, without being subject to mandatory proceedings to compel it to continue to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs; the rates fixed by law may be too small to enable it to operate at a profit, or without substantial loss; or, it may conclude, without any reason which the law would consider sufficient, that it will not continue. In case of a natural person it might become physically impossible. We do not intend to declare that in any such case mandatory process would be issued to compel the personal performance of the duty." [1]

**§ 298. Discontinuing further gas supply.**

In another late case [2] where the charter of the gas company in question was plainly permissive, and where moreover the contract with the municipality in question which constituted its franchise had expired, it was held that this company could not be stayed from discontinuing the supply of gas in the municipality. "It comes then to this," said the Ohio court, "if the refusal to comply is final, the company necessarily incurs the penalty of forfeiture of its franchise to serve the people of the city; but, on the other hand, there being no provision to that effect in the original contract, the city cannot directly or indirectly deprive the gas company of its property without due process of law when the latter withdraws from the further exercise of its franchise." [3]

**§ 299. Duty devolved upon municipality.**

Where the duty of operating a service is devolved upon

[1] See also Asher v. Hutchinson Water, L. & P. Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52 (1903).

[2] East Ohio Gas Co. v. Akron, 81 Oh. St. 33, 90 N. E. 40 (1909).

[3] Citing for this paragraph, Cleveland Electric Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. ed. 399 (1906).

a municipality, mandamus will always be granted when by proper construction of its charter the duty is mandatory, for it is clear that the legislature may direct the action of a municipality even to the extent of imposing pecuniary burdens. Thus in a recent decision [1] the city of New York was ordered to continue the operation of the Brooklyn ferries; Mr. Justice Blackmar saying: "One reason why the broad powers conferred by section fifteen were given to a municipal instead of a private corporation was that a municipal corporation would in establishing the ferries be moved rather by considerations of public good than of profit. Discretion as to the location of new ferries was therefore wisely vested in the city. But as to ferries already established, a different condition is presented. The growth and development of the city and of the connected territory on the opposite shores are largely influenced by the existence of the ferries. They are continuations of highways. Their cessation or re-location would seriously injure that portion of the community which had established its business and located its residences relying on these means of transportation." [2]

[1] Matter of Wheeler, 62 N. Y. Misc. 37, 115 N. Y. Supp. 605 (1908).

[2] Citing among other cases:

*United States.*—Union Pac. R. R. v. Hall, 91 U. S. 343, 23 L. ed. 428 (1875).

*Connecticut.*—State v. Hartford & New Haven R. R., 29 Conn. 538 (1861).

*Georgia.*—Savannah, etc., Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43 (1893).

*Massachusetts.*—Attorney General v. City of Boston, 123 Mass. 460 (1877).

*New Jersey.*—State ex rel. v. Bridgeton & M. Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837 (1899).

*New York.*—People v. Rome, W. & O. R. R., 103 N. Y. 95, 8 N. E. 369 (1886); Mayor, etc., of New York v. Starin, 106 N. Y. 1, 12 N. E. 631 (1887); Baird v. Supervisors, 138 N. Y. 95, 33 N. E. 827 (1893); People v. Board of Supervisors, 142 N. Y. 271, 36 N. E. 1062 (1894); People v. Northern Central Ry. Co., 164 N. Y. 289, 58 N. E. 138 (1900).

*England.*—The King v. Severn & Wye Ry. Co., 2 B. & Ald. 646 (1819).

**§ 300. No excuse for default in charter obligation.**

Where there is such an explicit provision in the charter accepted making full operation obligatory, the chartered company cannot interpose in any proceedings to compel it to act in accordance with its charter obligations any such excuse as that the abandoned service is unprofitable. As it is said tersely in one early case [1] where the railroad had received public lands in consideration for the construction of its line: "The fact that the operation of the road is unprofitable furnishes no excuse whatever for the failure to comply with the conditions of the grant, and the State may compel a compliance with the terms of the contract by mandamus or other appropriate remedy." Nor do the more extreme facts that whole service is made unprofitable furnish any excuse for abandoning the unprofitable part; for the services required must be performed while the franchise is retained. "It is a continuing condition co-extensive with the grant itself which applies so long as the company have the right to use and enjoy the franchise." [2]

[1] Quoted from State v. Sioux City & Pacific R. R. Co., 7 Neb. 357 (1878).

The following cases are founded on the principle that an explicit charter provision requiring operation of a public system will be enforced:

*United States.*—United States v. Union Pacific Ry. Co., 160 U. S. 1, 40 L. ed. 319, 16 Sup. Ct. 190 (1895).

*Illinois.*—Chicago & Alton R. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824 (1889).

*Indiana.*—Lake Erie & Western R. R. Co. v. State, 139 Ind. 158, 38 N. E. 596 (1894).

*Iowa.*—State v. Central Iowa Ry. Co., 71 Ia. 410, 32 N. W. 409, 60 Am. Rep. 806 (1887).

*Massachusetts.*—Brownell v. Old Colony R.R., 164 Mass. 29, 41 N. E. 107, 29 L. R. A. 169, 49 Am. St. Rep. 442 (1895).

*Michigan.*—People v. Plainfield Ave. Gravel Road Co., 105 Mich. 9, 62 N. W. 998 (1895).

*Nebraska.*—State v. Sioux City & Pacific R. R. Co., 7 Neb. 357 (1878).

*New York.*—People v. The Albany & V. R. R. Co., 24 N. Y. 261, 82 Am. Dec. 295 (1862).

*England.*—Regina v. Bristol & Exeter Ry. Co., 4 Q. B. 162 (1843).

[2] Quoted from People v. Troy & B. R. R. Co., 37 How. Pr. 427 (1869).

**§ 301. Effect of absolute insolvency.**

But if a public service corporation begins operations under a charter in which it bargains in return for its franchises to render regular service over its whole system at all times, it would seem that there can be no excuse from this obligation in whole or in part. Indeed, default therein will be a sufficient ground for forfeiture of its charter. No matter how good its excuses may be, the unprofitable character of the business does not absolve the company from full performance. It is true that where actual insolvency plainly appears mandamus should not issue. "The court will not make a useless or futile order—it will not do a vain thing." [1] But the very fact of default in the obligation is sufficient ground for forfeiture. "Inability to perform its functions, no matter what the reason, is one of the most potent grounds for forfeiture." [2]

**§ 302. Obligation persists so long as franchise is retained.**

If the franchise accepted by the particular public service company is mandatory in terms it would seem that this constituted an irrevocable obligation voluntarily assumed at the outset from which the company could not withdraw at its pleasure.[3] That Georgia case [4] is cer-

[1] Quoted from State v. Dodge, City, M. & T. Ry. Co., 53 Kans. 329, 36 Pac. 755 (1894).

[2] Quoted from People v. Plainfield Ave. Gravel Road Company, 105 Mich. 9, 62 N. W. 998 (1895).

See also Mobile, J. & Kansas City R. R. Co. v. Mississippi, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. 650 (1908). And see further Union Pacific R. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428 (1875).

[3] Where there is a mandatory provision in the charter accepted requiring permanent service, it seems that the railroad company must continue in full operation. See:

*United States.*—People v. Colorado Central Ry., 42 Fed. 638 (1890).

*Minnesota.*—State v. Southern Minnesota R. R. Co., 18 Minn. 40 (1871).

*Nebraska.*—State v. Sioux City & P. R. R. Co., 7 Neb. 357 (1878).

*New York.*—People v. Albany & Vermont R. R. Co., 24 N. Y. 261, 82 Am. Dec. 295 (1862).

[4] Savannah & O. Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43 (1893).

tainly conservative which holds that a canal company having accepted a mandatory charter making it its duty to keep its whole system in navigable condition should be ordered to conform to its charter. "So long as the corporation retains its franchise, it will not be allowed to urge as an excuse for failing to perform any duty required of it by its charter, that the same would be unprofitable. It cannot consistently keep the franchise and refuse to perform the duties incident thereto for the mere reason that such performance would be unremunerative. If the rights, privileges and franchises granted by the charter are in connection with the corresponding duties imposed no longer desirable, the company should simply surrender the charter." Moreover, so long as the company assumes to remain in enjoyment of a permissive charter it is held to its public obligations.[1] But if its franchise has expired it should be obvious that whether the charter be mandatory or permissive the company cannot be forced to perform services when it has no legal right to act.[2]

*Topic B. Abandonment of a Certain District*

**§ 303. Right to withdraw from particular district.**

As an abstract matter the rule as to partial withdrawal from the territory served might seem to be that the public servant may withdraw from any severable part. This is as before undoubted where the service has received no aid from the State. Thus a carrier over the highways could certainly shorten his route by cutting off some out-

[1] *California.*—Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137 (1907).

*Ohio.*—Gas Light Co. v. Zanesville, 47 Oh. St. 35, 23 N. E. 60 (1889).

[2] *United States.*—Laighton v. Carthage, 175 Fed. 145 (1909).

*Ohio.*—East Ohio Gas Co. v. Akron, 81 Oh. St. 33, 90 N. E. 40 (1909).

lying road; or the owner of several hotels could convert one into a boarding house. But the problem is much complicated when the service company has accepted a charter granting it special privileges under which it still wishes to act. In such a case it is plain, at least in accordance with the principles just discussed, that if the charter is mandatory in requiring full service throughout the whole territory no discontinuance can be made. But, as will be seen presently there is conflict of authority as to whether there may be a withdrawal from a part of the service where the charter is permissive.

**§ 304. Doctrine applies only to constructed portions.**

The doctrine as usually stated is not that the acceptance of a charter containing permission to construct obliges all the construction described, but that as portions of the plant are constructed in accordance with the franchises granted, their operation becomes obligatory. It seems to have once been held in England that a railroad company by accepting its enabling charter became bound to build the line described.[1] But this was early over-

[1] "Now the objects and purposes for which this company has been incorporated and empowered, or, in the words of the passage cited, what the legislature has empowered and compelled them to do and to submit to, are too clear to admit of any doubt. The title of the act itself 'for making a railway from London to Norwich and Yarmouth,' the benefits recited in the preamble as likely to result from opening a communication, not only between the towns there more particularly enumerated, but also between the metropolis and the eastern districts of the kingdom, from which it is alleged that 'great public advantage,' would result, the eastern terminus being a sea port of greater consequence than any in those eastern districts together with a minute description of the whole line, and a particular enumeration of all the places through which it is to pass, precludes all question on this matter. We consider it to be equally undeniable that to carry the railroad through a portion only of the described line, such as a third or a half, is a nominal, and not a real, compliance with the meaning of the act of Parliament." Reg. v. Eastern Counties Ry. Co., 10 Ad. & El. 531 (1839).

ruled and the general doctrine now is that a permissive charter simply enables the company to build without making construction obligatory, although it will often be provided that the part of the franchise not used shall be forfeited for nonuser. In establishing the present rule the leading English case [1] declared that to say that there is no difference between words of requirement and words of authority when found in such acts is simply to affirm that the legislature does not know the meaning of the commonest expressions, nor appreciates the various ways in which such a situation may be treated in different cases. The case concluded thus: "It is not for the public interest that the work should be undertaken by an incompetent company, nor that it should be begun, if, when made, it would not be remunerative. By leaving the exercise of the powers to the option of the company, the legislature adopts the safest check upon abuse in either of these respects,—self-interest."

**§ 305. System constructed under permissive charter.**

Where the charter which has been accepted is permissive merely, permitting the chartered company to construct the system as it has done, the cases are in irreconcilable conflict as to whether after such construction the accepting company is thereafter bound to continue the service or whether it may withdraw from a particular part of its present service. It is now probably the weight of authority that a company which has accepted public franchises cannot retain such of these rights as it pleases it to exercise, and refuse to regard the public interests as

[1] York & N. M. R. R. Co. v. Reg., 1 El. & Bl. 858 (1853).

Forfeiture of the part not seasonably utilized is the appropriate remedy:

*Montana.*—State v. Helena Power & Light Co., 22 Mont. 391, 56 Pac. 685, 44 L. R. A. 692 (1899).

*New York.*—People v. Albany & V. R. R. Co., 24 N. Y. 261, 82 Am. Dec. 295 (1862).

a whole. In the most elaborate case to this effect—State ex rel. v. Spokane Street Railway Company [1]—the court ordered a resumption of service upon an abandoned branch line, Mr. Justice Reaves concluding his elaborate argument thus: "Such corporations, then, may not, by their own acts, disable themselves from performing the functions which were the consideration for the public grant. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after, as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc. And it is not in degree only that these franchises differ from mills and inns. The one is private property, the other is a public function, which originally resided in the government, and, when delegated to either persons or corporations still retains the public use. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations." [2]

[1] State v. Spokane Street Ry. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515 (1898).

[2] In the following cases *mandamus* was held proper to compel operation of abandoned portion of an established system although the charter was hardly more than permissive:

*United States.*—Farmers' Loan & Trust Co. v. Henning, 8 Fed. Cas. 4,666 (1878); San Diego L. & T. Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220 (1899).

*California.*—Fellows v. Los Angeles, 151 Cal. 52, 90 Pac. 137 (1907).

*Connecticut.*—State v. Hartford & N. H. R. R., 29 Conn. 538 (1861).

*Kansas.*—City of Potwin Place v. Topeka Ry. Co., 51 Kans. 609, 33 Pac. 309, 37 Am. St. Rep. 312 (1893).

*Kentucky.*—Board of Trustees v. Chesapeake, O. & S. W. R. R., 94 Ky. 377, 22 S. W. 609 (1893).

*Mississippi.*—See State v. Mobile, J. & K. C. R. R., 86 Miss. 172, 38 So. 732 (1905).

*Missouri.*—Kansas City Interur-

**§ 306. Cases permitting partial withdrawal.**

However, there are almost as many cases permitting a partial withdrawal where there is no charter provision making the continuance of every service undertaken requisite. This was the prevailing view until the latter part of the last century; the usual doctrine being simply that when the charter was permissive the continuance of any service was left to the discretion of the company. But of late years the cases permitting withdrawal from a part of the service undertaken have stated considerable qualifications upon this right. This modern law is best summarized in a recent opinion [1] in Virginia by Judge Keith, holding that a railroad might discontinue service upon an unprofitable branch. "It may be asked, is a corporation having constructed a road to be permitted to abandon its use at its pleasure? We answer that it is not to be apprehended that the corporation will abandon any part of its line, the operation of which is found remunerative in the present, or that is likely to become so in the future. Where the line of railway, taken as a whole, cannot be profitably maintained; where its operation, when discreetly and economically managed, is attended with loss, it is difficult to perceive how a court can, by

ban Ry. v. Davis, 197 Mo. 669, 95 S. W. 881 (1906).

*Nebraska.*—State v. Sioux City & Pacific R. R. Co., 7 Neb. 357 (1878).

*New Jersey.*—State ex rel. Bridgeton v. Bridgeton Traction Co., 62 N. J. L. 592, 43 Atl. 715, 45 L. R. A. 837 (1899).

*New York.*—Brooklyn & R. B. R. R. Co. v. Long Island R. R. Co., 72 App. Div. 496, 76 N. Y. Supp. 777 (1902).

*Ohio.*—Akron v. East Ohio Gas Co., 53 Oh. L. Bull. 441 (1908).

*Pennsylvania.*—Erie & N. E. Railroad Co. v. Casey, 26 Pa. St. 287 (1856).

*Virginia.*—See Southern Ry. v. Franklin Ry., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297 (1899).

*Washington.*—State ex rel. v. Spokane St. Ry., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515 (1898).

*Wisconsin.*—See In re Attorney General, 113 Wis. 623, 88 N. W. 912 (1902).

[1] Sherwood v. Atlantic & D. Ry. Co., 94 Va. 291, 26 S. E. 943 (1897).

*mandamus* or otherwise, compel its operation to be continued. If the loss is the result of improvident and unthrifty management, the court may, at the suit of those interested, take charge of it for the benefit of all concerned, and run it through the instrumentality of a receiver, but if the traffic of the road is really insufficient to support a wise and economical administration of its affairs there would seem to be no escape from its ultimate abandonment. Such cases are possible, though rare. It more frequently happens, however, that a part of the line becomes unprofitable, though the system as a whole may be valuable. In such an event the court will inquire, first, as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, while with respect to those duties which were not imposed by the charter, but which have been assumed by the corporation under permissive grants of power, it will consider all the circumstances of the case, and if upon the facts it shall appear that the duty unfulfilled inflicts no particular injury or hardship upon those who make the complaint, and that the service which they receive is under all the conditions reasonably adapted to their needs, while the performance of the duty would entail a burden and loss upon the company far in access of any benefit conferred, and which might in its ultimate effect embarrass or prevent the performance of other duties with respect to larger interests, and affecting a far greater number of citizens, the court will withhold its hands."[1]

[1] The following cases hold that a public service company may be permitted to retire from any separable part of the business:

*United States.*—Northern Pacific Railroad v. Dustin, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. 283 (1891).

*Illinois.*—Linck v. City of Litchfield, 31 Ill. App. 118 (1888).

*Indiana.*—State v. Connersville Nat. Gas. Co., 163 Ind. 563 (1904).

*Kansas.*—Asher v. Hutchinson W., L. & P. Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52 (1903).

*Maryland.*—Whalen v. Baltimore

**§ 307. Discontinuance by public permission.**

The general contention here made that the mere fact of actual undertaking without mandatory provision should not unvariably create an irrevocable obligation to continue forever that particular service, is borne out by the cases which hold that where there is a franchise obligation the company may be relieved from it by permission granted by the public authorities. In a recent case [1] of this sort a water company which had laid its pipes into a district under agreement with the city, was permitted to take up its mains by the authorities. Discussing a complaint of an individual in the abandoned district Justice Greene said: "An individual can acquire no vested right as against the public in the continued service of a public utility. Such a doctrine once admitted would destroy the convenience as a public utility; it would then become hampered and subject to the control of the individual and made to subserve such interests, to the detriment of the public welfare."

**§ 308. Abandoned service must be separable.**

The contention here adopted, that where there is insufficient demand for the particular service there may be withdrawal from an existing service, should contain this qualification, that the part abandoned must be truly separable. A company may not abandon an intregal

& O. R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130 (1908).

*Massachusetts.* — Commonwealth v. Fitchburg Ry. Co., 12 Gray, 180 (1858).

*Montana.*—State v. Helena Power & Light Co., 22 Mont. 391, 56 Pac. 685, 44 L. R. A. 692 (1899).

*New York.*—People v. Rome, W. & O. R. R. Co., 103 N. Y. 95, 8 N. E. 369 (1886).

*Ohio.*—East Ohio Gas Co. v. Akron, 81 Oh. St. 33, 90 N. E. 40 (1909).

*Pennsylvania.*—Kearney v. Borough of West Chester, 199 Pa. St. 392, 49 Atl. 227 (1901).

*Texas.*—San Antonio Railway v. State, 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662 (1897).

[1] Asher v. Hutchinson Water, L. & P. Co., 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52 (1903).

part of its service and expect to remain unmolested. An interurban railway, for example, could not abandon its main line between two cities and retain its local rights in the respective cities. This possibility is adverted to in the leading case for the view here taken.—San Antonio Street Railway Company v. State,[1] where Gaines, C. J., said: "Under the grant of a privilege to construct and maintain, if after acceptance it is permissive only to construct, it is not obligatory to maintain. But we do not hold that the company can, against the will of the city, operate a part of its line and not the whole. A privilege to establish an entire line of street railway may be granted when the privilege of constructing and operating a part only would not be; and for failure to operate a part, it would seem that the whole might be forfeited. It seems to us that the remedy in that case is to forfeit the franchise to operate the branch line in controversy." [2]

*Topic C. Abandonment of a Particular Service*

**§ 309. Right to withdraw from a particular service.**

The problem as to the obligation to continue to render every sort of service that has been undertaken where various services have been offered to the public is obviously much the same as the obligation to continue service in every district in which service has been rendered. The general contention is repeated here that unless there is a mandatory provision in the franchise requiring the performance of the services in question any particular service which is truly separable may be given up under certain limitations upon due notice. And upon this point

[1] 90 Tex. 520, 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662 (1897). Quoted with approval in State v. Helena Power & Light Co., 22 Mont. 391, 56 Pac. 685, 44 L. R. A. 692 (1899).

[2] See also Chicago & A. R. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824 (1899).

the few authorities are practically unanimous that partial withdrawal may be made within the limitations just mentioned.

**§ 310. Service demanded by charter.**

Of course where there is a mandatory provision requiring certain services these must be rendered. Thus in Re New Brunswick and Canada Railway Company [1] an application on behalf of the town of St. Andrews, New Brunswick, for a mandamus against the railway company to compel them to run a train each way each day. The liability of the company to perform this duty was established by the act under which the company was incorporated, which required it to run at least one daily train each way over the main line and branches. Mr. Justice Allen would not admit any excuses to this obligation. "If the fact that this portion of the line does not pay running expenses will justify the company in disobeying the direction of the acts in running daily trains, we cannot see what there is to prevent them from abandoning that part of it altogether, and so leaving, as a matter in their discretion, that which the act has imperatively imposed on them as an absolute duty." [2]

**§ 311. Partial withdrawal generally permitted.**

Where there is no mandatory provision it would seem that there might be withdrawal from any portion of the service which is truly separable. The leading case for this is Commonwealth v. Fitchburg Railroad Company.[3] In this application for mandamus it was shown that the railroad at some time after construction of the Watertown

[1] In Re New Brunswick & Canada Ry. Co., 1 Pugsley & Burbridge (N. B.), 667 (1878).

[2] See also Litchfield & M. R. R. Co. v. People, 222 Ill. 242, 78 N. E. 589 (1906).

[3] Commonwealth v. Fitchburg R. R. Co., 12 Gray (Mass.), 180 (1858).

branch had discontinued passenger service over it (after due notice) while continuing freight service. The *quo warranto* was brought against the corporation to forfeit its franchises. The railroad answered that since the construction of a competing street railway the passenger receipts had so fallen off that the passenger service had been operated at a loss. The court dismissed the information, Mr. Justice Thomas discussing the matter after this fashion: "The precise question before us is, whether the running of regular passenger trains was, under the facts admitted by the demurrer, a legal duty? Neither the statutes under which the respondents hold their franchises, nor the general laws regulating railroad companies, in terms impose upon the respondents such duty. If it had been intended that the duty of running trains should be absolute, it would have been made definite. If the duty is to be held absolute, how long, for what period of time, is it to be performed? It is during the lifetime of the charter, and this though the expense of running the train is daily and rapidly using up the capital stock of the company." [1]

**§ 312. Temporary withdrawal not permissible.**

It was assumed in the case first discussed that the company might temporarily withdraw its service and later, when the occasion demanded it, resume service. In the particular case where the railroad tracks were still used for freight service, this is probably correct. But certainly a railroad which abandons service altogether even without intention to do so permanently, cannot but subject itself to liability. Thus where a street railway virtually abandoned operation until it could bring its striking employés to terms, the New York Supreme Court

[1] To the same effect is Ohio & M. Ry. Co. v. People, 120 Ill. 200, 11 N. E. 347 (1887).

issued *mandamus*, Mr. Justice Gaynor saying:[1] "It may not lawfully cease to perform that duty even for one hour." The only instance that occurs to the writer at the present moment of justifiable withdrawal for a temporary period is where there is no real public demand for the service during that period. Thus a mountain railroad at a summer resort might cease running at other seasons. This seems to be borne out by a later case in the same court involving the same parties where it was held that service over an elevated railway might be withdrawn except at rush hours, there being other traction facilities sufficient to meet the local demands at other hours. Judge Kellogg saying [2] that to order such operation would involve sheer "economic waste."

**§ 313. Service abandoned must be separable.**

According to the principles already discussed the service abandoned must be separable. It cannot be law that a railroad carrying general freight including lumber can, by giving notice, withdraw from the carriage of cedar lumber, nor ought a railroad for policies of its own be permitted to refuse to accept coal in the future except in bulk from tipples. From the authorities in general the doctrine is plain enough that there can only be withdrawal from distinct classes of business. As has been seen there are many instances where a public service company is engaged in rendering separate services. Thus the supply of gas for fuel and for illumination are distinct service, so that a gas company might after engaging in both branches withdraw from the other. And, similarly, an electric company supplying energy both for illumination and power may decide to devote itself exclusively to one or the other.

[1] Loader v. Brooklyn Heights Ry. Co., 35 N. Y. Supp. 996, 14 N. Y. Misc. 208 (Matter of Loader) (1895).

[2] People v. Brooklyn Heights Ry. Co., 75 N. Y. Supp. 202 (1902).

*Topic D. Reasonable Notice of Withdrawal*

**§ 314. Notice of withdrawal necessary.**

The theory of public profession which has here been developed is that its existence depends upon the public impression which is the result of either an express profession to the public which at once commits one to public employment, or by an implied profession established by a continued course of conduct upon which the public have been led to rely. Theoretically, therefore, withdrawal from public employment may be similarly evidenced, either by express notice or by continued conduct. Thus an innkeeper, as the early cases hold, may make public his withdrawal from public calling by merely taking down his sign.[1] And it has been said that a warehouseman may signify his withdrawal from public employment by public advertisement that his premises are no longer open upon a public basis.[2] A wharfinger who has once refused an applicant on the ground that he has retired from public service need not repeat it.[3] But it would take a long time doubtless to convince the public by circumstantial evidence that a common carrier who still continued his trips had become a private carrier.[4]

**§ 315. Colorable withdrawal.**

There should perhaps be a word of warning as to colorable withdrawal. Instances are not unknown where to escape the troublesome obligations of public service, the proprietors of the enterprise have given public notice that they have ceased to conduct the business upon a public basis while all the time dealing with the most of the pub-

[1] Rex v. Collins, Palmer, 373 (1623).

[2] Glass v. Davis, 23 Gratt. (Va.) 184 (1873).

[3] Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345, 53 L. ed. 1024, 29 Sup. Ct. 661 (1909).

[4] Satterlee v. Groat, 1 Wend. 272 (1828).

lic as before. This situation was provided against in one of the very early cases [1] where it was stated that the innkeeper's giving up of his business must be *bona fide;* if he merely pretends to give up the business while really continuing to receive guests, he will remain liable. "If an innkeeper taketh down his signe, and yet keepeth an hostelerie, an action upon the case will lie against him, if he do deny lodging unto a traveller for his money." A modern instance of this sort may be seen in a New York case [2] where it appeared that the Delaware & Hudson Canal Company had sold part of its canal property to a cement company which still kept the canal open, but, claiming that it was now maintained as a private property, attempted to exclude from its use a competing cement company located upon its banks. The Court of Appeals held, however, that under the circumstances there had not been a real withdrawal from the business, which apparently could only be by an abandonment of the canal for transportation services.

**§ 316. Situation requires reasonable notice.**

The parallel between entering public service and quitting it is not quite perfect; for although one may enter upon public service on public notice without preparing the public for his advent, one may not it seems abandon public service without notice to the public. The new element of a public duty now existing has supervened, which must be reckoned with when one who has assumed a public employment would lay it down. Certainly the service in hand must be completed. An innkeeper cannot turn the guests he has accepted out into the night, nor the carrier abandon his passengers short of their des-

[1] Anonymous, Godbolt, 345, pl. 440 (1623).

[2] New York Cement Co. v. Consolidated Rosendale Cement Co., 178 N. Y. 167, 70 N. E. 451, modifying 84 App. Div. 635, 81 N. Y. Supp. 1137, modifying 76 App. Div. 285, 78 N. Y. Supp. 531 (1904).

tination. One may go further with confidence and say that an innkeeper could not without notice take down his sign at nightfall, nor, a carrier abandon his schedule without warning to his public. This means that there is a public duty in the matter to give reasonable notice of the intention to abandon, which they owe the public; for they have given the public cause to rely upon the continuance of their service, although they may by reasonable notice leave their public to get service elsewhere. These general principles are sufficiently established to justify action; there are already several instances in the books of the granting of temporary orders to prevent a public company which had threatened cutting off suddenly an established service.[1] And upon similar principles mandatory processes have been issued to compel an electric company to furnish temporarily a service from which it is conceded,[2] it might ultimately withdraw. Where the company has no legal right to continue service it will not be ordered to go on. Thus in a recent case [3] a gas company, its contract with the municipality having expired, was permitted to withdraw on short notice. And in another [4] a water company, its franchise rights having run out, was held justified in stopping service without notice.

**§ 317. What constitutes reasonable notice.**

It must be admitted, however, that little law as yet exists as to the length of the notice that must be given. But it may be asserted with confidence that what is reasonable notice in a particular case depends upon the

[1] Bienville Water Supply Co. v. Mobile, 112 Ala. 260, 20 So. 742, 57 Am. St. Rep. 28, 33 L. R. A. 59 (1895).

[2] Seattle Electric Co. v. Snoqualmie Falls Power Co., 40 Wash. 380, 82 Pac. 713, 1 L. R. A. (N. S.) 1032 (1905).

[3] East Ohio Gas Co. v. Akron, 81 Oh. St. 33, 90 N. E. 40 (1909).

[4] Laighton v. Carthage, 175 Fed. 145 (1909).

character of the business. A teamster might withdraw upon a day's notice doubtless, as his patrons may quickly make other arrangements. A canal boatman might tie up at the end of any trip, for the other opportunities for shippers over the canal are numerous. But a railroad company [1] may not without a long notice abandon its line. And a gas company [2] could abandon its service only after a long enough period to provide a new supply. It is not principally the special privileges which these service companies have received that makes their withdrawal difficult; it is because the duplication of these particular services takes a long time, and, therefore, the public is so dependent upon the established service that it would lead to intolerable hardships if the proprietors were permitted to withdraw without long notice. A rule of law to meet all conditions would have to go so far as to say that one cannot withdraw from public service without notice sufficiently long to enable those deprived of the service to make the necessary arrangements for the provision of other service.

**§ 318. Substituting one service for another.**

Consistent with this general principle is the recognized rule that when a company withdraws a service that has been rendered and at the same time offers another that is a reasonable substitute, only a brief notice to apprise the public of the new arrangement need be given. There are several important cases in the books of this sort. The most obvious is the recent Maryland case [3]

[1] The recent Georgia case is certainly correct which holds that a railway cannot without notice remove a spur track upon which a shipper is relying to complete his shipments. Durden v. Southern R. R. Co., 2 Ga. App. 66, 58 S. E. 299 (1907).

[2] There is an Indiana case in which it was held apparently that a gas company could not discontinue its service except upon reasonable notice. Indianapolis v. Indianapolis Gas Co. (Ind. Cir. Ct.), 35 Ch. Leg. News, 165 (1902).

[3] Whalen v. Baltimore & O. Ry.

where it was held that such rectification of the line as the public interests might dictate could be made notwithstanding particular disadvantage to private business. "A railroad company is a public service corporation, and is obliged to use its powers and privileges for the benefit of the public, and in aid of the public good. It must, therefore, from time to time, conform to the requirements of public travel and commerce, and adjust its grades, its route, and its curvatures to these needs. No contract on its face can interfere with these public duties. To compel a railroad company to maintain its main stem on the old location forever is to render it impossible for the corporation to ever make in conformity with its own needs and the public's interests any change in its transportation route." [1]

**§ 319. Results of consolidating services.**

In other cases this point of duplication is made. In a leading case in New York [2] it was held that: "Where a railroad company owns by consolidation two lines of road, and can substantially accommodate the people of the State by operating one line between the same points, and can abandon the other line without any serious detriment to any considerable number of people, we do not believe it should be compelled by mandamus to operate both lines, at a great sacrifice of money, upon the fanciful idea that the sovereignty of the State is wounded by its omission to operate both lines." [3]

Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130 (1908).

[1] Mandatory provisions might prevent relocation of this sort. State v. Northern Pacific Ry. Co., 89 Minn. 363, 95 N. W. 297 (1903).

[2] People v. Rome, W. & O. R. R. Co., 103 N. Y. 95, 8 N. E. 369 (1886); People v. Brooklyn Heights R. R. Co., 75 N. Y. Supp. 202, 65 App. Div. 549 (1902), *accord*.

[3] See People v. Colorado Central R. R. Co., 42 Fed. 638 (1890).

**§ 320. Division of territory served.**

The decision of the Supreme Judicial Court of Massachusetts in a recent case [1] is of considerable importance in this connection. There were two electric lighting corporations holding franchises and doing business in Boston where complainant's house was. He was formerly served by the respondent company, but the two corporations entered into an agreement, for division of territory by drawing a line, and the supply of the complainant fell to the other company. It was alleged that electric lighting companies, being *quasi*-public in nature, were bound to serve all persons who were within reach of their lines, but the court held otherwise, Chief Justice Knowlton saying: "We think that a corporation making such an arrangement is not subject to prosecution under a writ of mandamus, for a failure properly to exercise its corporate franchise. We are not called upon to determine in this case whether such an arrangement could be availed of as a justification, if, unexpectedly, it should turn out that the public interest was injuriously affected. We do not suggest that a corporation can relieve itself of the performance of its duties to the public under its franchise, but only that details of administration, not inconsistent with the legislative policy of the Commonwealth, may be left to the corporation, so long as adequate provision is made for the public. We go no further than to say that, under conditions like the present, the public has no grievance which the court will recognize." [2]

[1] Weld v. Gas & Electric Light Commissioners, 197 Mass. 556, 84 N. E. 101 (1908).

[2] But because there is another service in the territory served the original company cannot refuse to serve all within the territory it still professes to serve. See, for example, Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639 (1893).

# BOOK II. OBLIGATIONS OF PUBLIC DUTY

# PART III. DUTY TO THE PUBLIC

## CHAPTER X

### NATURE OF PUBLIC DUTY

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**§ 330. Public obligation the fundamental principle.**

From the very beginning of our law, as has been seen,

it has been recognized that some kinds of business were of special importance to the public, and that all persons engaged in such business owed the public peculiar duties. No one could be compelled to enter upon the employment; but if he chose to do so, he thereby undertook the performance of the public duties connected with it. The property which he devoted to the public employment was held to be affected with a public interest, ceasing to be *juris privati* only, as Lord Hale said so long ago. Plainly this is more true to-day than ever before; for the overshadowing importance of the public services in our modern life must be obvious to all. But the extent to which the primary duty of public service may go is just beginning to be appreciated. The duty placed upon every one exercising a public calling is primarily a duty to serve every man who is a member of his public. Implicit in this primary duty, necessarily involved in its full performance are various requirements. Not only must all be served, they must have adequate service; not only must they not be charged extortionate rates, but there must be no discrimination practiced. In such an elaborated statement there is no more than the plain recital of the present recognition of different aspects of public duty. The duty to serve the public is the fundamental principle from which all the rules of public service may be derived. In a true sense therefore, the law governing public service is an entirety.

### *Topic. A. Essential Character of the Obligation*

**§ 331. Nature of the public duty.**

The fundamental fact in public employment is the public duty which results in all cases from public profession of a public calling. It is somewhat difficult to place this exceptional duty in our legal system. It is like the con-

tractual obligation in that it is an affirmative duty to act for a certain person; but it is different in that it does not depend upon assent of the party charged. It is like the obligation in tort in that it is imposed by law; but it is not imposed upon anyone against his will as is the obligation in tort. In one sense the obligation to serve the public is voluntarily assumed; and therein the public duty to act differs from the typical duty not to commit a tort, which each person without his ever being consulted owes to all the world. And yet once this obligation is established by his undertaking, his duty extends to all within the profession, however unwilling he may be in a particular case to render service. Public duty is in this sense imposed by law upon those who put themselves into public service; and therein very plainly the situation differs from the typical contractual duty which one owes only in particular cases to the persons with whom he has voluntarily negotiated a previous agreement. If one may thus employ the two traditional phrases, the duty is absolute rather than relative. For it is a duty imposed by law regardless of dissent in particular instances, not one for which the actual assent of the person obliged is necessary in every case. And yet it must be obvious that in public obligation we have an intermediate case in many respects. It is like a status which one is under no obligation to enter except by his own free will; but, once having committed himself to it, the duties pertaining to that status are devolved upon him by operation of law regardless of his own wishes. However, he is committed to it no further than the peculiar law governing the situation requires.

**§ 332. Obligations of the subsequent relationship.**

This argument may be carried still further. Even after a relationship has been established between the proprietor

and the patron by application and acceptance, it still remains generally true that the resulting obligations are imposed by law as the necessary consequence of the undertaking.[1] There is no actual contract involved, although there is a consensual arrangement in the sense that the consent of the proprietor as well as that of the patron is needed to create it. In this view of the duty it is difficult to place it in our law. It is not exactly absolute, because it does not exist unless it is assumed; but certainly it is not relative after it is once assumed. This situation is not without analogies in our law. If a common carrier is under special obligation because he assumes as such, so is a private bailee governed by the law appertaining to his position as such. If a public servant is bound to peculiar responsibilities by reason of his status, a private agent is similarly bound by special law. In all cases of this sort the action against the person who has not acted toward the person entitled to his regard in accordance with the obligation of his status is really *ex delicto* rather than *ex contractu*.[2]

**§ 333. The original obligation is sui generis.**

The truth of the matter is that the obligation resting upon one who has undertaken the performance of a public duty is *sui generis*. It cannot be forced into the typical forms of action without artificiality, as experience has shown. When the wrong complained of is the refusal

[1] The duties of a carrier may arise out of usage as well as from statutory enactments, and when once established the obligation of the carrier to perform them is as binding in the one case as in the other. State v. Atlantic Coast Line Ry. Co. (Fla.), 52 So. 4 (1910).

[2] Where a suit is brought against a common carrier alleging that he being a common carrier for hire failed to furnish promptly facilities for transporting freight which had been tendered to him, the common law duty being apparent, it is not subject to demurrer. Southern Ry. Co. v. Moore (Ga.), 67 S. E. 85 (1910).

of the proprietor of the business to render the service requested, the applicant may indeed frame a proper action on the case setting forth the nature of the defendant's business and his profession of it, and showing how he himself is entitled to demand the service, having complied with all conditions predecent. The character of this action is well described by Chief Justice Biddle in the leading American case.[1] "This action is brought against a railroad company that has become a common carrier, as is alleged, by holding itself before the public as such, and thus has undertaken the general public duty of carrying goods for all persons who may apply, and necessarily thereby has incurred the liability incident to a breach of such general public duty, to all persons injured thereby, without any special contract in the given case. The case, therefore, must be governed by the general law regulating the remedy for a breach of a public duty." [2]

**§ 334. Nature of the obligation after acceptance.**

When however, the wrong complained of is some default of the proprietor of the business in the performance of a service which is being rendered by virtue of his acceptance of the application of the patron, the situation is made difficult by the common practice of permitting the customer in such a case to make this breach the basis of either an action on the case for tort or an action in assumpsit apparently like that for breach of contract. Even in this case it is probable that the contract form dates back to that early assumpsit against those who undertake the performance of a public duty, which long antedates the

[1] Pittsburgh, C. & St. L. Ry. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682 (1878).

[2] There is nothing in the nature of a contractual obligation creating the relationship of host and guest between an innkeeper and a traveler whom he has refused to take in. Bennett v. Mellor, 5 T. R. (Eng.) 273 (1793).

action of assumpsit for the enforcement of a private bargain. In one of the leading English cases [1] where the action was for default in service already begun Chief Justice Dalles said:—"The action is on the case, against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to convey and carry their goods and passengers safely and securely, so that by their negligence or fault no injury happens. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." [2]

**§ 335. Chief reliance upon tort.**

There are various classes of cases which make it necessary to decide whether the action by an injured party against one who has committed some default in the performance of his duty is contractual or delictual in nature. It will be remembered that in recovering damages in contractual actions one is limited to what was contemplated by the parties while in tort actions all proximate consequences are admitted. It is in such cases that this fundamental problem becomes so vital an issue that it receives elaborate discussion. No one has put this better than Chief Justice Taney in Saltonstall v. Stockton,[3] before him on circuit, where an action on the case was brought against the proprietors of a stagecoach for injury to passengers who alleged that by the misconduct

[1] Bretherton v. Wood, 3 Brod. & Bing. (Eng.) 54 (1821).

[2] That the obligations of the relationship between the public servant and his patron are created by law and not by the will of the parties appears from the fact that it is universally agreed that the law of the place of reception determines the extent of the obligations resulting therefrom. It was so held of the relationship between innkeeper and guest in Holland v. Pack, Peck, (Tenn.) 151 (1823).

[3] Taney, 11 (1838).

of the driver they were compelled to leap from the coach to save themselves, which resulted in their injuries. The Chief Justice held that the law of torts was more applicable to this situation than the law of contracts: "Injuries received in cases of this description are not violations of a contract between the parties, but are breaches of the duty imposed by law upon the carrier; they are torts. The plaintiff might, without doubt, have sued in assumpsit; but there are many cases where the law implies a contract, where there was, in fact, no agreement between the parties; this is done in order to give the plaintiff a more convenient remedy for his right, by enabling him to sue in assumpsit. And there are cases where an individual who has sustained an injury from the breach of a legal duty, may waive the tort and sue as upon a contract; this is the case with innkeepers and their guests, where property intrusted to the care of the innkeeper has been lost by his breach of duty; yet the obligations of innkeepers in that respect are prescribed by law, and their neglect is not a violation of contract, but a breach of the duty which the law imposes; and it is always so described in the ancient writs. And if the relation in which the carrier and passenger stand to one another—to wit, that of bailor and bailee—can be said to be created by contract, yet, as soon as that relation subsists, the law interposes and prescribes the rights and duties, and liabilities of both parties; it regulates the degree of skill and care with which the passenger is to be carried, and any negligence on the part of the carrier, is an unlawful act, is a breach of legal duty. Indeed, even the relation of bailor and bailee is not created by contract; for those who undertake the business of carrying persons are regarded by law as if they were in the public service, and the carrier cannot refuse to take anyone of good character who conducts himself properly and pays the usual fare

(provided he has room for him), and if he refuses, he is liable to an action; so that the passenger takes his seat upon paying the usual fare, not by force of a right acquired by contract with the carrier, but in the exercise of a right secured to him by law; a right which the carrier cannot resist without committing a breach of a legal duty." [1]

**§ 336. No dependence upon contract.**

It is significant also that one who has entered into relations with the proprietor of a public service, his request for the service having been accepted, is not dependent upon contract to get compensation if wrongs are done him. This becomes a vital issue in one class of cases where as the service is arranged it comes within the statute forbidding Sunday work. If for instance a passenger who has been accepted by a common carrier on Sunday for a trip which has no excuse in necessity or charity suffers damage by reason of any default of the carrier in the performance of his obligations, it is well established that the passenger is not driven to the hopeless course of working out his rights through the illegal contract, but he may bring an action in the nature of tort for the breach of the duty which a carrier owes his passengers. In the leading case [2] to this effect Mr. Justice Andrews said:— "We deem it unnecessary to decide the question, which was argued with great ability by counsel, touching the liability of the defendant in the action, treating it as founded upon the contract between the parties. The gravamen of the action is, the breach of the duty imposed

[1] By these principles a gas company which negligently allowed its pressure to fall off has been held liable for causing the death of a sick child due to its room being left without heat. Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N. E. 171 (1897).

[2] Carroll v. Staten I. R. R. Co., 58 N. Y. 126 (1874).

by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the person it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands." [1]

**§ 337. Essential elements in contract not necessary.**

To some extent the process by which the proprietor of a business which is public in character undertakes for a particular applicant the performance of a definite service is similar to that by which a contract is formed. There is proposal and acceptance in both cases; and the relationship resulting in both cases may be described as consensual. But there are also fundamental differences. The request of the applicant is one to which the proprietor is bound to accede; and moreover, the obligations resulting from the acceptance are far more extensive than anything that could be worked out of the actual negotiation which takes place. It is therefore doubtful whether there can be said to be in the normal case mutual assent to a contractual obligation. Moreover an arrangement in which one of the parties does no more for the other than he is bound by law to do would generally be held not to show the necessary elements of valid consideration. It is difficult therefore to find an enforceable contract in the normal relationship between the proprietor and his patron. Never-

[1] Upon the same principle a telegraph company is liable for any default in transmitting a business message which it has accepted on Sunday. Western Union Telegraph Co. v. McLaurin, 70 Miss. 26, 13 So. 36 (1892)

theless the law has no difficulty in enforcing against each his respective duties. That consideration is unnecessary is brought out by that striking class of cases where the proprietor undertakes the particular service gratuitously. It is agreed that where there is no understanding to the contrary the proprietor may well owe to the person receiving the service the same duty that he owes to a paying customer. This was explained by Mr. Justice Grier [1] in holding a carrier liable. "This duty does not result alone from the consideration paid for the service. It is imposed by law even when the service is gratuitous." [2]

**§ 338. Contract cannot be required.**

It is not however impossible for special contracts to be formed between the proprietor and his customer, provided the parties to the service voluntarily enter into an arrangement different from what their respective rights and duties would be at common law. But the customer must not be coerced into giving his assent, and valid consideration must be found in some variation from the common law obligation. The special contract is particularly common in railroad transportation, the railroads making a much lower rate to those who will ship upon special contract waiving the common law liability of the carrier as an insurer of the goods carried. But if such contracts are to stand, the common law basis must be available upon reasonable terms,[3] or else there will be a failure

[1] Philadelphia & R. R. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. ed. 291 (1852).

See generally Chapter XXII.

[2] Upon this principle an innkeeper is liable as an insurer of the goods of a person lodging with him as a guest although he is making no charge against him. See Walling v. Potter, 35 Conn. 183 (1868).

[3] The quotation which follows is by Cooley, J., in McMillan v. Michigan S. & N. I. R. R. Co., 16 Mich. 79, 111 (1867).

See also Southern Exp. Co. v. Meyer Co. (Ark.), 125 S. W. 642 (1910).

See generally Chapter XXIX.

to perform the public duty in evidence. "A common carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a reduced liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment." And this is generally true in public service that the proprietor may not attempt to impose upon a patron the condition that he must enter into a special contract for the service required. An applicant for water is entitled to have service upon the common law basis without contracting away any of his rights, although as will be seen later, he may be required to subscribe to a formal application.[1] This was well brought out in a recent case where an irrigation company which had formerly been supplying a patron upon a basis very advantageous to it, refused when the contract ran out to accept his application for service upon the usual terms now granted others, and insisted upon his renewing his expiring contract. It was of course decided that this could not be justified.[2] In the best reasoned telegraph cases it is said that if the company forces a patron to sign away his rights by refusing to take his message in any other way than upon their blank which contains this special contract, the company cannot hold him to his promises.[3]

**§ 339. Applicant need not have the capacity to contract.** For these reasons it is not necessary to find in a patron the capacity to make a contract. The relationship may

[1] See Dittman v. New Braunfels, 20 Tex. Civ. App. 293 (1899).

[2] San Diego L. & T. Co. v. Sharp, 38 C. C. A. 220, 97 Fed. 394 (1899).

[3] See Mathis v. Western Union Telegraph Co., 94 Ga. 338, 47 Am. St. Rep. 167 (1894).

See also Kevoy v. Western Union Telegraph Co., 4 So. Dak. 105, 46 Am. St. Rep. 765 (1893).

be as well established with a person under incapacity, with an infant or a married woman, as with a person entirely *sui juris*. Thus in a Kentucky case,[1] where an infant was entertained at an inn it was held that the innkeeper might charge him his usual rates and hold his baggage for his bill. "Appellant being an innkeeper, was bound legally to receive and entertain all guests apparently responsible and of good conduct, who might come to his house, and if he refused to do so, he was liable alike to all; and the mere fact of infancy alone in the applicant would not justify him in any such refusal," said the court; and it added that an infant could not avoid his consequent obligations, "it would be a legal absurdity to compel a man to make a contract, and at the same time permit the other party, who is the instrument of compulsion to avoid such a contract." This is assumed to be the law in a late Missouri case [2] where a married woman applied for a supply of gas, although it should be said that there were at that time such statutes in force as to make her practically capable.

**§ 340. Incapacity of the proprietor to contract no excuse.** This rule works both ways. Thus when a man has become and remains an innkeeper, a supervening incapacity on his own part will not protect him from responsibility; the obligation of the status remains so long as he keeps in the position. In an old English case [3] where an innkeeper was sued for failure to keep safely the goods of his guest, he pleaded that at the time the guest lodged with him he was sick and of *non sane* memory. On demurrer, this was held not to be a good plea. "For the defendant,

[1] Watson v. Cross, 2 Duv. (Ky.) 147 (1865).

[2] Vanderberg v. Gas Co., 126 Mo. App. 600, 105 S. W. 17 1907).

[3] Cross v. Andrews, Cro. Eliz. 622 (1598).

if he will keep an inn, ought at his peril to keep safely his guest's goods; and although he be sick, his servants then ought carefully to look to them. And to say he is of *non sane* memory it lieth not in him to disable himself." A modern form of this problem is presented when a corporation undertakes a service which is *ultra vires*. It is law for instance that although the corporation operating the railroad is in reality a private corporation with no authority to act as a common carrier, still it may be liable as a common carrier for injury to a passenger which it has assumed to carry.[1]

**§ 341. Relationship established although another pays.** Another proof of this theory is that the relationship with its concomitant obligations may be established with one person although another be bound to pay. Thus in order that a person may be a passenger it is not necessary that the relation of passenger and carrier be established through an agreement and payment of fare made by himself. The agreement may be made and the fare paid by a third person. Such was the case where the owners of slaves paid their passage and shipped them on steamboats to a certain destination—these slaves were held to be passengers.[2] So in the case of a young child traveling free with its parent, under a statute or a rule of the company, which permits such a child to travel without payment of fare, the agreement in this case, if any, is made by the person with whom the child is traveling; but the child occupies towards the carrier the position of a passenger from the time it is received with the adult passenger.[3] And so a servant is a passenger whose fare is paid

[1] Albion Lumber Co. v. De Nobra's Adm., 44 U. S. App. 347, 72 Fed. 739, 19 C. C. A. 168 (1896).

[2] Boyce v. Anderson, 2 Pet. (U. S.) 150, 7 L. ed. 379 (1829).

[3] *Alabama.*—Ball v. Mobile Light & R. R. Co., 146 Ala. 309, 39 So. 584, 119 Am. St. Rep. 32 (1905).

*Kentucky.*—Southern R. R. Co. v. Lee (Ky.), 30 Ky. L. Rep. 1360,

by his master.[1] In short, the relation of passenger and carrier does not arise out of a contract obligation, the relation comes into existence whenever the person accepted is rightfully carried. Similarly if a man goes with his family to a hotel each member of the family is a guest, though the head of the family is alone responsible for payment of the innkeeper's charges.[2] A most important consequence of this general principle is that a person must be served when the compensation is tendered by another.[3] But although not truly contractual the initia-

101 S. W. 307, 10 L. R. A. (N. S.) 837.

*Massachusetts.*—Littlejohn v. Fitchburg R. R., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502 (1889).

*Michigan.*—Withey v. Pere Marquette R. R., 141 Mich. 412, 104 N. W. 773, 1 L. R. A. (N. S.) 352, 113 Am. St. Rep. 533 (1905).

*Missouri.*—Rawlins v. Wabash Ry. Co., 97 Mo. App. 515, 71 S. W. 534, 97 Mo. App. 511, 71 S. W. 535 (1903).

*England.*—Austin v. Great W. Ry., L. R. 2 Q. B. 442 (1867).

A child traveling with an older person who refuses to pay his fare is not entitled to be regarded as a passenger. Beckwith v. Cheshire R. R. Co., 143 Mass. 68, 8 N. E. 875 (1886).

If enough is not tendered for both, both may be expelled. Eddy v. Elliot, 4 Tex. Ct. of App. 248, 15 S. W. 41 (1890).

[1] *South Carolina.*—Mims v. Seaboard Air Line Ry., 69 S. C. 338, 48 S. E. 269 (1904).

*England.*—Marshall v. York N. & B. Ry., 11 C. B. 655 (1851).

[2] *New York.*—Kopper v. Willis, 9 Daly, 460 (1881).

*Vermont.*—Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560 (1868).

The dependent person may be ejected along with the person who has him in charge.

*Minnesota.*—Braun v. Northern Pac. Ry. Co., 79 Minn. 404, 82 N. W. 675, 79 Am. St. Rep. 497 (1900).

*Ohio.*—Lake Shore & M. S. R. R. Co. v. Orndorff, 55 Oh. St. 716, 45 N. E. 477, 60 Am. St. Rep. 716 (1897).

Beneficiaries designated in a contract made with another to transport them have full rights.

*United States.*—Motley v. Louisville & N. R. Co., 150 Fed. 406 (1907).

*Kansas.*—Curry v. The K. & C. P. R. Co., 58 Kans. 6, 48 Pac. 579 (1897).

[3] *United States.*—Missouri R. & T. Ry. Co. v. Smith, 152 Fed. 608 (1907).

*Indiana.*—Baltimore & O. R. R. Co. v. Norris, 17 Ind. App. 189, 46 N. E. 554 (1896).

*Indian Territory.*—Missouri, K. & T. Ry. Co. v. Smith, 6 Ind. Terr. 99, 89 S. W. 668 (1905).

*Missouri.*—Randall v. Chicago,

tion of the relationship is at least consensual; it follows that an intending passenger may refuse to have the officious tender of a bystander attributed to him.[1]

**§ 342. Statutory provisions for public service.**

It will often happen that the duty to serve in a given calling will be found to be enacted in a particular statute. In early times such statutes may have been thought necessary. Thus there are many statutes from an earlier day setting forth the duty of innkeepers and millers. In later times such statutes may be laid to the codifying theory, the desire to have these duties settled in detail beyond question. Thus there have been elaborate statutes relating to railroad service and irrigation supply. These statutes will stand unless they are so unduly regulative or so obviously confiscatory as to deprive those engaged in this business of their liberty or property. But aside from these statutes defining the duties of those engaged in these businesses which are recognized as public callings, are other statutes imposing upon certain businesses the obligations of public service where this has either been doubtful at common law or denied. Such statutes have their office in hastening the development of the law when the courts are over cautious in taking the responsibility or lacking in appreciation of new conditions. But the legislation cannot under our American system go much further, for if it proposes to subject to public service any businesses which it would be beyond reason to consider affected with a public interest, the legislation would be unconstitutional.

R. I. & P. Ry. Co., 76 S. W. 493, 102 Mo. App. 342 (1903).

*New York.*—O'Brien v. New York C. & H. R. R. R. Co., 80 N. Y. 236 (1880).

*Pennsylvania.*—Ham v. Delaware & H. C. Co., 142 Pa. St. 617, 21 Atl. 1012 (1891).

*Tennessee.*—Louisville & N. R. R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640 (1881).

[1] Birmingham Ry., L. & P. Co. v. Lee, 153 Ala. 386, 45 So. 164 (1907).

**§ 343. Franchise provisions for public service.**

It was once common, before the time when the obligations put upon those who undertake a public service were appreciated, to include in the charter of a public service company a free statement of its obligations to the public. The binding force of such stipulations upon the company which accepts such a charter is not to be denied, and the public nature of such duties is disclosed by the fact that mandamus will be granted to enforce them as a matter of course. Examples of this policy are to be found throughout this treatise. Such charters to-day generally go no further than to require the company to maintain its service in general for the benefit of the whole public. Moreover in the granting of other franchises the same course has been followed. Once it was common for the locality in granting a franchise to a public service to stipulate anxiously for the right of its citizens to have service but it has long since been recognized that these obligations may safely be left to the common law. The only occasion for such stipulation is where the municipality is able to bargain with the company for something more than the common law might require, as for a schedule of rates lower than it would be certain that the company could be compelled to make.

*Topic B. To Whom the Obligation is Owed.*

**§ 344. The duty is owed to a particular public.**

To generalize from all cases that have been discussed it would seem to be proper to say that one who undertakes a public service owes a duty to serve every member of the public within his profession. That which in the quaint language of the early cases may seem a mere conceit really is practically the truth of the matter. One who undertakes public employment has, in effect, thereby ex-

posed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. But the duty as thus defined is not to all men but to a certain public limited in various ways according to the usual profession. Thus a gas company owes its duty only to those who occupy premises within the territory covered by the service. And an innkeeper does not owe his duty to all who apply to him, but only to travelers. These two examples selected from the next chapter in which this matter is fully discussed show that the duty itself has its limitations.

**§ 345. What constitutes a default to an individual.**

As this duty is to a particular public, it follows that no member of the public as such has a right of action for the breach of it. On the contrary an individual can only make out a breach to him of the duty owed to him by showing that being one within the profession to whom the general duty was owed and having conformed with all the prerequisite conditions properly imposed, the service he thus requested was thereupon refused him. That makes out the *prima facie* case; if there is general justification or particular excuse, it rests upon the company to set up such affirmatively. As usually happens, the decisions as to the proper pleadings against a public company show exactly the real duty. Thus in a declaration against one engaged in public employment it is only necessary to set forth the facts; the public duty to act is a matter of law and need not be averred. So a recent Connecticut case [1] holds of a declaration against a common carrier. On the other hand, a declaration by the applicant stating that the defendant refused to act, although he had applied to it to act for him within the scope of the business, is held fatally defective for not stating the essential facts,

[1] Lang v. Brady, 73 Conn. 707, 49 Atl. 199 (1901).

but dealing simply with a conclusion of law. So a recent Florida case [1] holds of a declaration against a telegraph company. Once the essential fact of established employment and proper application are stated, however, a *prima facie* case is made out.[2] It is therefore upon the defendant to meet that by setting up his excuses whatever they may be.[3]

**§ 346. Applicants must be desirous of service.**

The public duty that is being defined is necessarily limited to responding to the proper applications of those who are desirous of the sort of service which has been professed; there is no duty to do anything different, and no breach by refusal. That there is no breach of duty in refusing to serve an applicant who is not desirous of present service should be plain upon the general principle of public necessity which underlies the law of public service. In one case in mind [4] a householder who was using electricity for lighting his house sought to have the gas company compelled to continue to maintain its service pipe and keep connections for his benefit, so that in case of failure of the electric supply the gas service would be immediately available. But the court was plainly of opinion that to such an applicant, not desirous of present service, no attention need be paid. "A statement of the proposition suggests its answer," it said: "there is no equality or equity in such a proposition." [5]

[1] South Florida Telegraph Co. v. Maloney, 34 Fla. 338, 16 So. 280 (1894).

[2] Ayres v. Chicago & Northwestern Ry. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 (1888).

[3] Chicago, St. L. & P. R. R. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320 (1984).

[4] Fleming v. Montgomery Light Co., 100 Ala. 657, 13 So. 618 (1892).

[5] So it is generally held that a man who has no goods requiring transportation cannot complain of a failure to furnish him with cars. Wilder v. St. Johnsbury & L. C. Ry., 66 Vt. 636, 30 Atl. 41 (1891).

**§ 347. Application to test rights.**

A difficult problem is presented when the person presenting himself is making his application in order to test his rights. It may be granted that if he is in truth desirous of the service he asks, the traveler may demand his rights, even if as in some cases one of the objects of the traveler in taking the trip was to recover a penalty for a wrongful refusal of a tender, which it was believed would occur.[1] But if one is applying for service with no desire to obtain it, but with the sole intention of qualifying himself for bringing suit, he is not really applying for service in the sense of the law. This was well brought out in one case [2] wherein certain parties who had got themselves refused two or three thousand times in order to bring suits for the penalties were enjoined. The railroad company, it was said, owes no duty to furnish a ticket to anyone unless that person desired to put it to the use for which it was made and issued. Such desire is absolutely inconsistent with a desire to have it refused, in order to lay the foundation for a cause of action by securing such refusal.[3] A demand made in bad faith, and with a desire for a refusal, is wholly ineffective.[4]

**§ 348. Liability to sendee of telegram.**

A prominent class of cases are those telegraph cases

[1] Adams v. Union Ry. Co., 21 R. I. 134, 42 Atl. 515 (1899).

[2] Southern Pacific Co. v. Robinson, 132 Cal. 408, 64 Pac. 572 (1901).

[3] *Georgia.*—Southern Ry. Co. v. Barlow, 104 Ga. 213, 30 S. E. 732 (1898).

*Iowa.*—Jolley v. Chicago, M. & St. P. Ry. Co., 119 Iowa, 491, 93 N. W. 555 (1903).

[4] See further: Bull v. New York City Ry. Co., 192 N. Y. 361, 85 N. E. 385 (1908). Supporting expressly: Myers v. Brooklyn Heights R. R. Co., 10 App. Div. 335, 41 N. Y. Supp. 798 (1896); Nicholson v. New York City Ry. Co., 118 App. Div. 858, 103 N. Y. Supp. 695 (1907); and therefore necessarily overruling: Fitzmartin v. New York City Ry., 51 N. Y. Misc. 36, 99 N. Y. Supp. 765 (1906); McLean v. Interurban St. Ry., 102 N. Y. App. Div. 18, 92 N. Y. Supp. 77 (1905).

which allow the sendee, as he is called, to recover for fault of the company in the transmission of the message. Although such an action fails in England,[1] it is almost universally successful in the United States on one theory or another. As summarized in one of the American cases[2] there are certainly four principal theories: (1) That, as a telegraph company is in the exercise of a public, as distinguished from a private, calling, it is the common agent of both parties to a telegraph message, or a public agent liable to anyone injured by its negligence;[3] (2) That the person addressed is the beneficiary of a contract;[4]

[1] Playford v. United Kingdom Electric Telegraph Co., L. R. 4 Q. B. 706 (1869).

See further Feaver v. Montreal Telegraph Co., 23 Upp. Can. C. P. 150 (1873).

[2] Western Union Telegraph Co. v. Allen, 66 Miss. 549, 6 So. 461 (1889). This paragraph and the next are largely written from this case.

See also the general language in Western Union Telegraph Co. v. Woodward, 84 Ark. 323, 105 S. W. 579 (1907).

[3] See the language in these cases particularly.—

*California.*—Coit v. Western Union Telegraph Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153 (1900).

*Illinois.*—Western Union Telegraph Co. v. Dubois, 128 Ill. 248, (1889), 21 N. E. 4, 15 Am. St. Rep. 109, 29 Ill. App. 219, (1888).

*Indiana.*—Western Union Telegraph Co. v. Fenton, 52 Ind. 1 (1875).

*Louisiana.*—De La Grange v. Southwestern Telegraph Co., 25 La. Ann. 383 (1873).

*Massachusetts.*—Ellis v. American Telegraph Co., 13 Allen, 226 (1866).

*Mississippi.*—Shingleur v. Western Union Telegraph Co., 72 Miss. 1030, 18 So. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604 (1895).

*Missouri.*—Lee v. Western Union Telegraph Co., 51 Mo. App. 375 (1892).

[4] See the language in these cases particularly.—

*Alabama.*—Kennon v. Western Union Telegraph Co., 92 Ala. 399, 9 So. 200 (1890).

*Kansas.*—Russell v. Western Union Telegraph Co., 57 Kans. 230, 45 Pac. 598 (1896).

*North Carolina.*—Sherrill v. Western Union Telegraph Co., 109 N. C. 527, 14 S. E. 94 (1891).

*Oklahoma.*—Butner v. Western Union Telegraph Co., 2 Okla. 234, 37 Pac. 1087 (1894).

*Oregon.*—Frazier v. Western Telegraph Co., 45 Oreg. 414, 78 Pac. 330, 67 L. R. A. 319 (1904).

*South Carolina.*—Aiken v. Telegraph Co., 5 S. C. 358, 371 (1874).

*Texas.*—Western Union Tele-

(3) That the message is the property of the person addressed, the position of such person being analogous to that of a consignee of goods,[1] and (4) That the sendee is the principal of the telegraph company in those cases where he originally employed the company.[2] But after considering each of them carefully this court gave up in despair. "The fundamental principle is that there is some breach of duty, and whether this duty is logically deduced from any well-recognized rules applicable to other relations becomes immaterial when there is consensus of judicial opinion as to its existence."

**§ 349. Discussion of the conflicting theories.**

Objections can be made to the application of each and every principle, in analogy to which the courts act. To those decisions in which the telegraph company is treated

graph Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920 (1889).

[1] See the language in these cases particularly.—

*United States.*—Western Union Telegraph Co. v. Lawson, 182 Fed. 369 (1910).

*Georgia.*—Western Union Telegraph Co. v. James, 90 Ga. 254, 16 S. E. 83 (1892).

*Pennsylvania.*—New York & Washington Printing Telegraph Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338 (1860).

*Virginia.*—Western Union Telegraph Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715 (1883).

[2] See the language in these cases particularly.—

*Iowa.*—Harkness v. Western Union Telegraph Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672 (1887).

*Kentucky.*—Chapman v. Western Union Telegraph Co., 90 Ky. 265, 13 S. W. 880 (1890).

*Maryland.*—United States Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519 (1868).

*New York.*—Milliken v. Western Union Telegraph Co., 110 N. Y. 403, 18 N. E. 251 (1888).

Where the law assumes that the sender is the party in interest, the interest of the sendee must affirmatively appear. See Anniston Cordage Co. v. Western Union Telegraph Co., 161 Ala. 216, 49 So. 770 (1909).

Where the law assumes that the sendee is the party in interest, the interest of the sender must affirmatively appear. See Western Union Telegraph Co. v. Bell (Tex. Civ. App.), 90 S. W. 714 (1905)

as bailee, it may be objected that a bailee is one who receives property and that intelligence is not property subject to bailment. To those which deduce the liability from the principles of agency, that the company is agent only for him who employs it. To those which hold that the sendee may sue upon the contract, as one made for his benefit, that one not a party to an executory contract has no right of action on it. To those which declare that the telegraph company is in the exercise of a public employment, and is responsible for any breach of duty, that it owes no duty to the public as individuals except to contract with each on his demand, and that there is no contract save with the sender of the message. It yet remains true that the courts on some one or the other of these grounds, have steadily adhered to the rule of liability; and this must have its reason. Difficult this matter may be, but the writer feels that in almost all the cases where the sendee has been allowed to recover, the arrangement may be said to be made without violence to the real facts in behalf of the sendee by the sender acting for him. Thus the consignor very often acts for the consignee; and on such facts there has never been any dispute as to the right of the consignee to sue the carrier. This explains why when the sendee has no real interest he cannot recover. Neither can the addressee when the consignor retains the ownership.

**§ 350. Individual rights to fire protection.**

A similar problem arises in relation to hydrant supply to a city for extinguishment of fires. The usual form in which this comes up is a suit by a householder in a municipality against the water company supplying the district seeking to recover damages in his own right for the failure to supply sufficient water to extinguish the fire which destroyed his premises. In most jurisdictions he

fails;[1] in several jurisdictions, however, he succeeds.[2] It will be noticed in analyzing these cases that in all of them

[1] *Alabama.*—Lovejoy v. Bessemer Water Works Co., 146 Ala. 374, 41 So. 76, 6 L. R. A. (N. S.) 429 (1906).

*California.*—Ukiah City v. Ukiah Water & Imp. Co., 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107 (1904).

*Connecticut.*—Nickerson v. Bridgport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1 (1878).

*Georgia.*—Fowler v. City Waterworks Co., 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313 (1889).

*Idaho.*—Bush v. Artesian Hot & Cold Water Co., 4 Idaho, 618, 43 Pac. 69, 95 Am. St. Rep. 161 (1895).

*Indiana.*—Fitch v. Seymour Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258 (1894).

*Iowa.*—Davis v. Clinton Waterworks Co., 54 Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185 (1880).

*Kansas.*—Mott v. Cherryvale Water Co., 48 Kans. 12, 28 Pac. 989, 15 L. R. A. 375, 30 Am. St. Rep. 267 (1892).

*Maine.*—Hone v. Presque Isle Water Co., 104 Me. 217, 71 Atl. 769, 21 L. R. A. (N. S.) 1021 (1908).

*Mississippi.*—Wilkinson v. Light, Heat & Water Co., 78 Miss. 389, 28 So. 877 (1900).

*Missouri.*—Metz v. Cape Girardeau Water Works Co., 202 Mo. 324, 100 S. W. 621 (1907).

*Nevada.*—Ferris v. Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485 (1881).

*New York.*—Wainwright v. Queens County Water Co., 78 Hun, 146, 28 N. Y. Supp. 987 (1894).

*Ohio.*—Blunk v. Dennison Water Co., 71 Ohio, 250, 73 N. E. 210 (1905).

*Pennsylvania.*—Beck v. Kittanning Water Co. 11 Atl. 300 (1887).

*Tennessee.*—Foster v. Lookout Water Co., 3 Lea, 42 (1879).

*Texas.*—House v. Houston Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532 (1895).

*West Virginia.*—Nichol v. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290 (1903).

*Wisconsin.*—Britton v. Green Bay & Ft. H. Waterworks Co., 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856 (1892).

[2] *United States.*—Guardian Trust Co. v. Fisher, 200 U. S. 57, 50 L. ed. 367, 26 Sup. Ct. 186 (1906).

*Florida.*—Mugge v. Tampa Water-works Co., 52 Fla. 371, 42 So. 8 (1906).

*Kentucky.*—Paducah Lumber Co. v. Paducah Water Supply Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 7 L. R. A. 77, 25 Am. St. Rep. 536 (1889).

*North Carolina.*—Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598 (1899).

See also these cases, somewhat doubtful:

*Louisiana.*—Allen, etc., Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 1980, 68 L. R. A. 650, 104 Am. St. Rep. 525 (1905).

*South Carolina.*—Ancrum v. Camden Water, L. & I. Co., 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029 (1909).

there is a contract between the waterworks and the municipality in which it is provided that a certain pressure shall be maintained. If this contract is broken it would seem to give an individual citizen no right to sue for the breach of that promise made to the municipality. So the cases generally hold. Some few cases seem to maintain that the citizens should be regarded as the sole beneficiaries of that contract; but the difficulty with that view is that the performance was promised the municipality and was not by its terms to be made to citizens individually. It would be a convenient way out of the difficulty, as some hopeful persons now assert, if it could be said that by so contracting the company has undertaken the supply of water for the extinguishment of fires. But has the individual citizen entered into any relation with the company in this respect by making an application which has been accepted? If the applicant, as in one case, had been refused water for his sprinkler system, he would make out a breach to him; but the cases discussed are obviously different. The only way in which a default to the citizen could be worked out, would be to show that the obligation created really runs to the citizens individually; but it is more obviously made to the municipality as an entity.

**§ 351. Common law basis for individual rights.**

The difficulty of this problem makes necessary further consideration of the conflicting cases. The argument for the citizen is succinctly put in the latest North Carolina case summarizing the others.[1] "There can be no real contention that the plaintiff, a citizen and taxpayer, and one of the beneficiaries in the purview of this contract cannot prosecute this action. He is the real party in interest. He is taxed with payment of his pro rata of the annual

[1] Jones v. Durham Water Co., 135 N. C. 553, 47 S. E. 615 (1904).

rental. The town cannot maintain this action for the loss sustained by him by reason of the defendant's failure to perform the provisions of the contract above recited. For this injury the plaintiff alone can sue. The same principle has been often affirmed; to wit, that the beneficiary of a contract, though not a party to it, nor expressly named therein, can maintain an action for a breach of such contract, causing injury to him, if the contract was made for his benefit." One of the most telling arguments to the contrary is contained in the leading Texas case:[1] "It is not true, that for every failure to perform a public duty an action will lie in favor of any person who may suffer injury by reason of such failure. If the duty is purely a public duty, then the individual will have no right of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon the individuals composing the public." The writer is inclined to follow this last opinion. The only possibility by which the inhabitants could gain individual rights under this contract arrangement would be if the arrangement was made for their exclusive benefit as individuals. This does not seem to be the case.

**§ 352. Extent of public interests.**

It is commonly said of public employments that the whole public is peculiarly interested in having them carried on. And it has been noticeable in the judicial opinions of late that this general interest of the whole public is often made the basis of peculiar rules which can only be explained upon this public policy. Thus in granting receiverships to bondholders of public service companies it is generally stipulated that those who have kept up the public service without being paid while it was on the

[1] House v. Houston Waterworks Co., 88 Tex. 233, 31 S. W. 179, 28 L. R. A. 532 (1895).

verge of insolvency shall be paid even ahead of the mortgages out of the sale of mortgaged property.[1] This is altogether abnormal in mortgage law; and it seems that it is only to be explained by this public interest in the continued performance of the public services. To put another example, courts will sometimes grant specific performance, for a time at least, of arrangements necessary for the performance of a public service, although if only private interests were involved no such relief would ever be given. In one case [2] the court went so far as to grant specific performance for the time being of an agreement to supply electric power to a street railway which was admittedly without obligation.

**§ 353. Personal character of the individual right.**

The legal right which the customer of a public service company acquires by being accepted seems to be peculiarly a personal one. There is no necessary obligation by a particular acceptance except to give service to the particular customer. If another wishes service he must himself apply for the service he wishes. If one is traveling with a ticket from A to C (intending to go no further than B) he cannot assign to another the right to continue the journey from B to C, even by the same train.[3] And a railroad may make its tickets transferable or non-

[1] This doctrine has been developed by the United States Supreme Court in many cases since the original *dictum* in Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339 (1878).

And so the bankruptcy laws are held not applicable to public service companies lest the public service be interrupted or the public duty discharged. In re Bay City Irrigation Co., 135 Fed. 850 (1905).

[2] Seattle Electric Co. v. Snoqualime Falls Power Co., 40 Wash. 380, 82 Pac. 713 (1905).

It should be noted that the employés of public service companies are often held for a time to the performance of their duties in case of threatened strike. Toledo A. A. & P. M. Ry. Co. v. Pennsylvania R. R. Co., 54 Fed. 746 (1893).

[3] See particularly Roberts v. Koehler, 30 Fed. 94 (1887).

transferable as it wishes.[1] If one who is receiving service at certain premises goes out of business the company may consider itself under no further obligation in respect to those premises by virtue of the former arrangement.[2] It is for this reason that one is under no obligation to pay the charges for service accruing against his predecessor.[3]

**§ 354. Statutory requirements for service.**

It is not uncommon even at this day for the legislature to define certain of the duties of those engaged in certain callings where the legislature believes the common law to be doubtful or inadequate. Thus there are statutes in several States providing that upon due demand a railroad must furnish cars within a certain time definitely fixed, whereas at common law the obligation would be to furnish cars within a reasonable time. Upon the same basis are statutes requiring gas companies to furnish gas to all applicants within a certain number of feet of the established mains, while at common law the test would be a reasonable distance.

**§ 355. Statutory penalties for default.**

At some times in respect to some callings, statutes have been passed giving special remedies when there has been a refusal to serve. There is no uniformity in this legislation; but in certain States some services are singled out. The moving force back of the statutes which provide for the recovery of a penalty is the idea that where the actual damages that the applicant refused could probably recover are so small that they would not deter the proprietor of a service from capricious refusal some addi-

[1] See Hudson v. Kansas Pacific Ry. Co., 3 McCrary (U. S.) 249 (1882).

[2] See particularly Sullivan v. Chicago Board of Trade, 111 Ill. App. 492 (1903).

[3] See particularly Gaslight Co. v. Colliday, 25 Md. 1 (1866).

tional penalty would be necessary. Doubtless this is one explanation of the fact that from ancient times the refusal of an innkeeper to take in a traveler has been punished as a crime. Certainly this is the explanation of the statutes giving those who are refused service by a telegraph company the right to recover a penalty of a round sum.

## CHAPTER XI

### OBLIGATION LIMITED TO CERTAIN CLASSES

§ 360. Inherent limitation of the public service duty.

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**§ 360. Inherent limitation of the public service duty.**

It is ordinarily said that those who have undertaken a public service owe a duty to the public in general, whatever may be their inclinations. But it will be found upon inquiry that in the case of every public calling service is legally due to persons belonging to a special class and not to every member of the public, as such. This is the inevitable consequence of the elementary principles as to the essential nature of public employment and the necessary scope of public profession. By these fundamental rules an employment is held public in its nature only in so far as it is affected with a public interest and only to the extent that it has been undertaken. Both that public interest and that public profession must coexist in order that there may be a public duty in particular cases. That being so, it is natural to find that in most public callings either the real necessity is confined to a certain class or the undertaking assumed has been solely toward a special class. It is to that extent and to them that the public duty is therefore established. There have already been examples enough of limitations of this sort in adjudicated cases to make this matter sufficiently plain.

*Topic A. Duty Limited to Travelers*

**§ 361. Special need of travelers.**

From ancient times it has been recognized that in certain public employments the public duty is owed only to travelers. It is only as to dealings with travelers that these callings are affected with a public interest. Those who offer necessary services, protection or transportation, to wayfarers and travelers, always have the upper hand; their monopoly is temporary, but it is effectual, while these very same persons, in offering their services to the local population under other circumstances, have no monopoly at all. There is every reason, therefore, why innkeepers should be

bound to entertain weary wayfarers, and why carriers of passengers must take up travelers bound their way. And as all within the class being similarly circumstanced have practically the same need, it should not be open to those who are conducting these services to discriminate within this particular public. Thus the suggestion in one case that an innkeeper might confine his obligation to those who might come in their carriages,[1] or in another that travelers belonging to an unpopular race might be excluded,[2] are both inconsistent with the public duty which is owed to all travelers without regard to station or condition.

**§ 362. Carriers' obligation limited to travelers.**

That the business which the carrier of passengers undertakes is the transportation of travelers is so obvious that there are but a few cases which state it.[3] The necessary thing is that those upon a journey should be speeded on their way. The carrier of passengers does not undertake any other service than the transportation of passengers. Nor is he bound to furnish the use of his facilities to carry one for any purpose save his transportation. Thus in order to demand carriage one must be desirous of reaching his destination. Therefore, as will be seen later, one has no right to demand carriage for the purpose of selling goods. "A steamboat company or a railroad company is not bound to furnish traveling conveniences for those who wish to engage, on their vehicles, in the business of selling books, papers, or articles of food, or in the business of receiving and distributing parcels or baggage, nor to permit the transaction of this business in their vehicles, when it interferes with their own interests." [4]

[1] Johnson v. Midland Ry. Co., 4 Exch. (Eng.) 367, 371 (1849).

[2] State v. Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516 (1890).

[3] Jencks v. Coleman, 2 Sumn. 221 (1835).

[4] Quoted from The D. R. Martin, 11 Blatch. 233 (1873).

**§ 363 Innkeepers' duty owed only to travelers.**

The inn is established for travelers, and it is such persons only who are the necessary objects of the public solicitude. One who is not a traveler does not need the inn to protect him, for he can provide a home for that purpose. The public duty of the innkeeper is therefore owed to travelers only, and no one who is not a traveler can demand to be received at an inn.[1] Thus in the leading case on the law of innkeepers [2] the court said: "Common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is *diversorium*, because he who lodges there is *quasi divertens se a via;* and so *diversoriolum.* And therefore if a neighbor, who is no traveler, as a friend, at the request of the innholder lodges there, and his goods be stolen, etc., he shall not have an action; for the writ is *ad hospitandos homines, etc., transeuntes in eisdem hospitantes.*"

**§ 364. Who is a traveler?**

One who is making a very short journey may demand transportation as a traveler; however short the distance the passenger may be going, the carrier is liable as such.[3] Certainly under the modern decisions a man need not be at the time engaged upon a journey of any considerable length in order to be in a position to demand admission to an inn as a traveler.[4] Notwithstanding some *dicta* [5] it is entirely possible for a resident of the same locality to be considered a traveler. Where, for instance, a man on his way from his city office to his suburban home stopped at

[1] Rex v. Luellin, 12 Mod. 445 (1700).

[2] Calye's Case, 8 Coke, 202 (1584).

[3] *Illinois.*—Parmelee v. McNulty, 19 Ill. 556 (1858).

*Missouri.*—Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799 (1878).

[4] Atkinson v. Sellers, 5 C. B. (N. S.) (Eng.) 442 (1858).

[5] Carr's Case, 1 Roll. Abr. 3, pl. 4 (1583).

an inn to get dinner, he was held to be a traveler.[1] Justice Kennedy said in that case: "It does not seem to me to make any difference whether his journey be a long or a short one." But a man who takes a walk and just before reaching home goes into an inn to get a drink is not a traveler, and cannot demand the accommodation he seeks;[2] while if in course of a long walk for pleasure he stops on his way for refreshment at an inn, he is entitled to be entertained. For if he is *bona fide* in the course of traveling from one place to another he is none the less a traveler because the purpose of his journey is merely pleasure.[3] In short, anyone away from home receiving accommodations at an inn as a traveler is a guest.[4]

**§ 365. How long one remains a traveler.**

The determination of the question whether one who is staying at an inn is a guest or a boarder may depend upon whether the person is a resident of the town or a stranger. So a foreigner visiting the country and staying for a considerable time at a hotel was held a guest,[5] and a resident of another town, visiting the town where the inn was situated for business purposes merely, was held to be a guest.[6] On the other hand, an employé of a railroad, making his regular trips, and stopping over at each end of his route at the hotel, where he rents a room by the month, is not a guest. He is, as the court said, "a citizen of the community at both ends of the route." [7] So where a man breaks up his home and goes to a hotel in the same

[1] Orchard v. Bush, 2 Q. B. (Eng.) 284, 289 (1898).

[2] Murphy v. Innes, 11 So. Australia, 56 (1877).

[3] Taylor v. Humphreys, 30 L. J. M. C. 242 (Eng.) (1861).

[4] Walling v. Potter, 35 Conn. 183 (1868); Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242 (1885).

[5] Metzger v. Schnabel, 23 N. Y. Misc. 698, 52 N. Y. Supp. 105 (1898).

[6] Beale v. Posey, 72 Ala. 323 (1882).

[7] Horner v. Harvey, 3 N. Mex. 197, 5 Pac. 329 (1885).

town, he is a boarder.[1] And where a man sent his family to an inn in a distant city and they remained there for several months, while he made them an occasional short visit, his family were boarders and he was a guest.[2] But in a leading New York case [3] the family of an army officer stationed at a near by post were held to be guests of the hotel at which they remained for several months, on the ground that they would follow him whenever he might be ordered elsewhere.

**§ 366. When one ceases to be a traveler.**

One may thus remain a traveler for a long time. Thus in one year book case the weary suitor who follows the royal court from sitting to sitting, his hopes long deferred, is still a traveler. But after a considerable lapse of time one almost inevitably becomes a resident, and as he has no longer a right to demand entertainment the innkeeper may exclude him.[4] In a recent English case of this sort where a woman had remained at a hotel at a resort for about ten months, it was held that she could be ejected. Lord Esher said that: "The question whether a person has ceased to be a traveler was to be a question of fact, and mere length of residence was not decisive of the matter, because there might be circumstances which would show that the length of stay does not prevent the guest being a traveler, as, for instance, where it arises from illness." An American case [5] should be cited in qualification of the situation supposed in this quotation. In this case it was

[1] Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859, 46 L. R. A. 319 (1899).

[2] Lusk v. Belote, 22 Minn. 468 (1876).

[3] Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112 (1883).

[4] Lamond v. Richard, 1 Q. B. 541, 66 L. J. Q. B. D. 315, 76 L. T. (N. S.) 141, 45 W. R. 289, 61 J. P. 260 (1897).

See also Clifford v. Stafford, 145 Ill. App. 247 (1908).

[5] Haff v. Adams, 6 Ariz. 395, 59 Pac. 111 (1899).

See also Gray v. Drexel Arms Hotel, 145 Ill. App. 604 (1909).

properly said that one who will in all probability be compelled by the condition of his health to remain indefinitely ceases to be a traveler.

*Topic B. Obligations Incidental to the Service*

**§ 367. Persons properly upon the premises.**

Moreover, there are certain incidental duties pertaining to such employments. While the duty of the carrier to receive passengers for carriage extends only to travelers, he owes an incidental duty to certain other persons whose purpose in coming to the carrier is connected with the transportation of passengers or goods though they are not themselves travelers. Thus a carrier must, it would seem, admit a person who comes to make an inquiry about trains or to ask for a time-table.[1] So he must admit to his premises a person coming to a train to mail a letter.[2] And so one is entitled to admission to the premises of a carrier who comes to look for freight which is expected to arrive,[3] or to help unload freight which has arrived.[4] Upon similar principles one may properly enter an inn to inquire its terms or to ask for mail addressed to him.[5] And one may even enter a palace car to ask a favor.[6]

**§ 368. Persons desiring shelter merely**

A person who desires shelter merely is not one whom the carrier of passengers is bound to serve; and he may, there-

[1] Bradford v. Boston & M. R. R., 160 Mass. 392, 35 N. E. 1131, B. & W. 124 (1894).

[2] Hale v. Grand Trunk R. R., 60 Vt. 605, 15 Atl. 300, 1 L. R. A. 187 (1888). See also Atchison, T. & S. F. R. Co. v. Jandera, 24 Okla. 106, 104 Pac. 339, 24 L. R. A. (N. S.) 535 (1909).

[3] Toledo, W. & W. Ry. v. Grush, 67 Ill. 262, 16 Am. Rep. 618 (1873).

[4] Holmes v. North Eastern Ry., L. R. 4 Ex. 254 (1869).

[5] Strauss v. County Hotel & W. Co., 12 Q. B. D. 27, 53 L. J. Q. B. 25, 49 L. T. (N. S.) 601, 32 W. Rep. 170, 48 J. P. 69 (Eng., 1883).

[6] Williams v. Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85, 8 Am. St. Rep. 538 (1888).

fore, decline to receive such a person on his premises. Loafers have no rights upon a carrier's premises. Thus a railroad company is not bound to keep open its station after the last train has left in order to shelter an intending passenger who, having missed his train, is now waiting for a street car.[1] As Mr. Justice Devens said: "This room was not a place where every one might resort and use it for his own business, and he could not expect that it, or the way out of it, would be kept lighted until the arrival of the horse car for which, as he stated, he waited." Similarly one who is not a guest, or intending immediately to become a guest, has, generally speaking, no right to enter or remain in the inn against the objection of the innkeeper.[2]

**§ 369. Persons assisting or meeting passengers.**

It is well agreed that the carrier of passengers is under a duty to receive persons who come to help passengers in some way. Thus a hackman who comes to a station to bring a passenger is entitled to the carrier's services.[3] A common case of this sort is that of a person who comes to the carrier's premises in order to be of assistance to the departing passenger.[4] Such a person,[5] though not a

[1] Heinlein v. Boston & P. R. R., 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676 (1888).

[2] Commonwealth v. Mitchel, 2 Parsons (Pa.), 431 (1850).

[3] Tobin v. Portland, S. & P. R. R., 59 Me. 183, 8 Am. Rep. 415 (1871).

[4] Railway Co. v. Lawton, 55 Ark. 428, 18 S. W. 543, 29 Am. St. Rep. 48, 15 L. R. A. 434 (1892).

[5] *Georgia.*—Hill v. Louisville & N. R. R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A. (N. S.) 432 (1905).

*Indiana.*—Louisville, etc., R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443 (1889).

*Iowa.*—Galloway v. Chicago, etc., R. Co., 87 Iowa, 458, 54 N. W. 447 (1893).

*Kentucky.*—Berry v. Louisville & N. R. R. Co., 109 Ky. 727, 60 S. W. 699 (1901).

*Massachusetts.*—Lucas v. Taunton & N. B. R. R., 6 Gray, 64 (1856).

*Missouri.*—Doss v. Missouri, K. & T. Ry. Co., 59 Mo. 27, 21 Am. Rep. 371 (1875).

*New York.*—Rott v. Forty-second

passenger, is entitled to be admitted to the station; and he may even, in order to assist a passenger, demand admittance to a train. Similarly the carrier is bound to admit to his premises one who comes to meet an arriving passenger. Thus where a man who had come to a railway station to meet his wife was injured by a defect in the premises, he was held entitled to compensation.[1] As Mr. Chief Justice Graves said: "It is admitted in argument that had his presence at the station been in the character of a hackman engaged in running for passengers his stepping aside would not have been wrongful, and the duty of the company would have extended to him. We think it would be straining common sense to make such a distinction as is implied here. He was a customer within the essence of the rule just mentioned. The company was bringing his wife to him, and he went to receive and protect her. Had his errand been to receive a bale of goods or a horse, no one would doubt that he had all the rights of a customer, and it seems little less than preposterous to contend that the right was not simply different or inferior, but absolutely wanting, because it was his wife that he went for."

**§ 370. Convenience of the patron the test.**

Similar in principle are those cases where a stranger

St. Ferry R. Co., 56 N.Y. Super. Ct. 151, 1 N. Y. Supp. 518 (1888); Dunne v. N. Y., N. H. & H. R. R. Co., 99 App. Div. 571, 91 N. Y. Supp. 145 (1904).

*North Carolina.*—Morrow v. Atlanta & A. L. Ry. Co., 134 N. C. 92, 46 S. E. 12 (1903).

*South Carolina.*—Izlar v. Manchester & A. R. R. Co., 57 S. C. 332, 35 S. E. 583 (1889).

*Texas.*—Houston & T. C. R. R. Co. v. Phillis, 96 Tex. 18, 69 S. W. 994, 97 Am. St. Rep. 868, 59 L. R. A. 392 (1902).

*Wisconsin.*—Dowd v. Chicago, M. & St. P. Ry. Co., 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, and note, 36 Am. St. Rep. 917 (1893), *semble.*

[1] McKone v. Michigan C. R. R., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596 (1883). See also Missouri, K. & T. Ry. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905 (1894).

may desire to enter the inn, not merely for his own pleasure but because the convenience of a guest of the inn calls him there. While no right to enter the inn can be based on his own claim, he can under certain circumstances claim to be exercising a right of the guest. Where such is the case it would seem that his right to admittance is as clear as the right of a guest. It must be borne in mind, however, that in order to show a right of admittance he must base his claim on a right of the guest whom he comes to see. Although there is no direct authority in favor of such a right, it seems that a stranger coming to make a call upon the guest at the guest's request would have a right to be admitted for that purpose. Any other rule would deprive the guest of one privilege necessary for his comfort while at the inn. If, however, the guest has not previously requested the stranger to call, it seems clear that the stranger cannot object if he is denied admittance to the inn and the guest is not informed of his presence.[1] So one who comes by appointment to do business with a guest has a right to be admitted. "It is conceded," said Parker, J., in Markham v. Brown,[2] that he may be bound to permit the entry of persons who have been sent for by the guest." And even those courts which are most reluctant to permit the entrance of a stranger, do in fact concede the right to such persons.

**§ 371. Right involved is that of the person served.**

The same argument applies to the right of the person

[1] Commonwealth v. Mitchel, 2 Parsons (Pa.), 431, 1 Phila. 63 (1850).

[2] 8 N. H. 523, 31 Am. Dec. 209 (1837).

So one who comes to a railway station by appointment with a passenger to transact business with him must be treated properly.

*Minnesota.*—Klugherz v. Chicago, M. & St. P. Ry. Co., 90 Minn. 17, 95 N. W. 586, 101 Am. St. Rep. 384 (1903).

*Oklahoma.*—Cogswell v. Atchison, T. & S. F. Ry. Co., 23 Okla. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837 (1909).

who is not a passenger or an intending passenger, to be received by the carrier in order to accompany or to meet a passenger. This is a right primarily due to the passenger only; and it is only so far as the interest of the passenger requires it that the service can be demanded of the carrier. Thus when a person came to a station out of curiosity, in order to see the President of the United States, who was a passenger on a passing train, it was held that the carrier owed him no duty.[1] A similar case was one where one boarded a train to speak with an acquaintance and was injured under circumstances which would have shown liability if the plaintiff had been a passenger. But it was held that the defendant company owed such a person no duty of that sort since he was not upon the train in connection with any duty which the carrier owed the passenger.[2]

**§ 372. Extent of the duty to such persons.**

Even those persons to whom a duty is owed are not passengers. They are, in the language of the cases, "customers," and are entitled to safe and properly lighted premises.[3] But they are not entitled to the active pro-

[1] Gillis v. Pennsylvania R. R., 59 Pa. St. 129, 98 Am. Dec. 317 (1868).

[2] Bullock v. Houston & T. C. Ry. (Tex. Civ. App.), 55 S. W. 184 (1900). See also Arkansas & L. R. R. Co. v. Sain, 90 Ark. 278, 119 S. W. 659, 22 L. R. A. (N. S.) 910 (1909).

The same law applies if one having assisted a person on board returns later to talk with him. St. Louis, I. M. & S. Ry. Co. v. Tomlinson, 69 Ark. 489, 64 S. W. 347 (1901).

If it can be shown that the person suing for injuries was at the station for no other purpose than to bid the passenger good-by, there is authority for holding that the carrier is under no duty to him to keep the premises safe. Galveston, H. & S. A. Ry. Co. v. Matzdorf, 102 Tex. 42, 112 S. W. 1036, 20 L. R. A. (N. S.) 833 (1908).

[3] *United States.*—Illinois Central R. Co. v. Griffin, 80 Fed. 278, 53 U. S. App. 22, 25 C. C. A. 413 (1897).

*Georgia.*—Georgia R. R. & B. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565 (1896).

*Illinois.*—Toledo, W. & W. Ry. v. Grush, 67 Ill. 262, 16 Am. Rep. 618 (1873).

*Maine.*—Tobin v. Portland, S. & P. R. R., 59 Me. 183, 8 Am. Rep. 415 (1871).

tection which is due to passengers. Thus, while waiting in a station for a train, in order to meet a passenger, such a person is not entitled to protection against the assault of a stranger.[1] Where the person actually gets on board the train, assisting a passenger, and the train starts without giving him time to alight safely, the question whether the carrier has been guilty of a breach of duty is a difficult one. One or two cases are clear enough. If the conductor had no notice that the assistant was on the train, and the train stopped the usual and reasonable time, the carrier has performed its duty.[2] But if the conductor had notice that the assistant was on the train, the carrier must give him a reasonable time to alight. [3]

### *Topic C. Duty Limited to Occupiers*

### § 373. Special need of occupiers.

In several of the public services the undertaking is

*Massachusetts.*—Bradford v. Boston & M. R. R., 160 Mass. 392, 35 N. E. 1131 (1894).

*Michigan.*—McKone v. Michigan C. R. R., 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596 (1883).

*Nebraska.*—Union Pac. R. Co. v. Evans, 52 Neb. 50, 71 N. W. 1062 (1897).

*New York.*—Hauk v. N. Y. C. & H. R. R. Co., 34 N. Y. App. Div. 434, 54 N. Y. Supp. 248 (1898).

*Texas.*—Hamilton v. Texas & P. Ry., 64 Tex. 251, 53 Am. Rep. 756 (1855); Missouri, K. & T. Ry. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905 (1894).

*Vermont.*—Hale v. Grand Trunk R. R., 60 Vt. 605, 15 Atl. 300, B. & W. 124, 1 L. R. A. 187 (1888).

*England.*—Holmes v. North Eastern Ry., L. R. 4 Ex. 254 (1869).

[1] Houston & T. C. R. R. Co. v. Phillio, 98 Tex. 18, 69 S. W. 994, 97 Am. St. Rep. 868, 59 L. R. A. 392 (1902).

[2] One leading case is Missouri, K. & T. Ry. v. Miller, 8 Tex. Civ. 241, 27 S. W. 905 (1894). See also Coleman v. Georgia R. R. Co., 84 Ga. 1, 10 S. E. 498 (1889); Hill v. Louisville & N. R. R. Co., 124 Ga. 243, 52 S. W. 651 (1905); Griswold v. Chicago & N. W. Ry., 64 Wis. 652, 26 N. W. 101 (1885); Lucas v. New Bedford & T. R. R. Co., 6 Gray (Mass.), 64, 66 Am. Dec. 406 (1856).

[3] One leading case is Doss v. Missouri, K. & T. Ry., 59 Mo. 27, 21 Am. Rep. 371 (1875). See also Lousiville & N. R. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443 (1889); Johnson v. Southern Ry., 53 S. C. 203, 31 S. E. 212, 69 Am. St. Rep. 849 (1898).

limited to the occupiers of premises. The water companies, the gas companies, the electric companies and the telephone companies which undertake to distribute their product or perform their services generally throughout the city, do not undertake to serve every person as such. Their services are peculiarly necessary in connection with the use of buildings, and their obligation is properly held to be limited to the occupiers of premises by the general character of their customary undertaking.

**§ 374. Obligation limited to supply at premises.**

One of the most interesting of the comparatively few cases upon the question of the classes of persons who can demand supply from such service companies as gas companies arose recently in New Jersey.[1] This was a dispute between the Public Service Corporation which was engaged in the supply of gas to Jersey City, and the American Lighting Company, the proprietor of peculiar burners. At the bidding for the lighting of the streets, 1903, the American Lighting Company came in with the lowest bid; and the lighting was accordingly let to it. Thereupon it demanded that the Public Service Corporation should supply to it at the end of the pipe at the top of every lamp-post in Jersey City, enough gas to run the lamp at the regular rate for measured gas as supplied to householders generally in Jersey City. Vice-chancellor Pitney disposed of this case upon a number of points, one of them being this: "I am entirely of the opinion that the defendant, the lighting company, has no standing whatever, in its own right, to demand from the complainants a supply of gas. For the simple reason, above stated, that it is neither a householder nor a resident of Jersey City, and the obligation which is imposed upon complainants by

[1] Public Service Corporation v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482 (1904). See also American Lighting Co. v. Public Service Corporation, 132 Fed. 794 (1904).

reason of their enjoyment of a public franchise of laying mains in the streets, to furnish gas, extends only to residential citizens of the city and to the municipality. It is quite absurd to say that any person who might happen to be walking along the street and yet be destitute of any local habitation within the corporate limits of Jersey City has the least right to demand a supply of gas from the complainants." [1]

**§ 375. Necessity of telephone service at residence.**

It has been seen that as the modern telephone system is managed, one of the services offered is to subscribers at their residence. This being so, a telephone company cannot do what it attempted to do in one case,[2] insist that an occupier should be content with a pay station. For all occupiers have a right to residence service. "To conduct the business of the telephone by public telephone stations, and sending messengers to notify persons with whom a patron of the company desires to converse in other parts of the city; to compel the persons desiring to converse with others to remain at the public telephone station until the persons with whom they desire to converse can be notified, and so arrange their business as to leave and go to another telephone station and hold the conversation,—renders the use of the telephone almost worthless. It is by reason of the fact that business men can have them in their offices and residences, and, without leaving their houses or their places of business, call up another at a great distance, with whom they have important business, and converse, without the loss of valuable time on the part of either, that the telephone is particularly valuable as an instrument of commerce." [3]

[1] In Provident Inst. for Savings v. Allen, 37 N. J. Eq. 36 (1883), it was held that water rates cannot be assessed against vacant lots.

[2] Central Union Telephone Co. v. State, 118 Ind. 194, 19 N. E. 604 (1888).

[3] *Accord.*, Central Union Tele-

**§ 376. Duty owed to occupiers.**

According to this analysis of the situation the occupiers of every house within the territory served have a right to be supplied. The exact nature of this duty is well set forth in a leading case [1] where the relator, a tenant of a building, was refused service by the water company upon the ground that the company had decided that it would deal only with the owners of premises. But the court,—Mr. Justice Hunt writing the opinion,—held that the tenant must be served: "The relator is an inhabitant of Butte, occupying premises wholly without water for general use, and there are no other means by which water for his house may be secured, except from the appellant corporation. Ought the appellant to be allowed to refuse his tender for water in advance, and to refuse him water, upon the ground that, by virtue of its rules and regulations adopted, it can deal only with the owners of the property requiring water to be turned on, or the agents of said owners? We say not. It has no power to abridge the obligations, assumed by it in accepting its franchise, to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant in the possession and occupancy of a house, in need of water for general purposes." [2]

**§ 377. Certain consequences of this doctrine.**

In accordance with this doctrine the owner of the premises has no standing to complain of the refusal to

phone Co. v. State, 123 Ind. 113, 24 N. E. 215 (1889).

[1] State v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. Rep. 574 (1899).

[2] It should be added that this right to have service at the premises in question belongs solely to the legal occupant thereof, the tenant strictly. Thus a member of a family resident in the house has not as such the right to demand the continuance of gas supply. Vanderberg v. Gas Co., 126 Mo. App. 600, 105 S. W. 17 (1907).

supply his tenant.[1] It follows that the owner of the premises cannot be held liable for the bills of his tenant.[2] And therefore his premises cannot be subjected to any lien for such charges.[3] Similarly a new tenant cannot be affected by the arrears of a prior tenant,[4] for the new tenant has his own independent right to be served. This is all good common-law doctrine, but it may be, and sometimes is altered by the legislature by general statute or by provision in particular charters. By force of these provisions the company is permitted to look to the owners of the premises as such; and it is often provided that the arrearages shall constitute a lien upon the property itself.[5] Such legislation is held not unconstitutional, even if it goes so far as to provide for the eventual sale of the property in the hands of whomsoever it may be.[6]

## § 378. Supply to incumbered premises.

A mortgagee in possession has of course the same rights as an occupier to complain of refusal to give service; and it has been held that even a mortgagee out of possession

[1] Brass v. Rathbone, 153 N. Y. 435, 47 N. E. 905 (1897). See also Stein v. McArdle, 24 Ala. 344 (1854).

[2] McCarthy v. Humphrey, 105 Iowa, 535, 75 N. W. 314 (1898).

[3] Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 26 Am. St. Rep. 432 (1898).

[4] *Illinois.*—City of Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770 (1905).

*Kentucky.*—Covington v. Ratterman, 128 Ky. 336, 108 S. W. 297, 17 L. R. A. (N. S.) 923 (1908).

*Louisiana.*—New Orleans G. L. & B. Co. v. Paulding, 12 Rob. (La.) 378 (1845).

*Maryland.*—Gaslight Co. v. Colliday, 25 Md. 1 (1866).

*Mississippi.*—Burke v. City of Water Valley, 87 Miss. 732, 40 So. 820, 112 Am. St. Rep. 468 (1906).

*South Carolina.*—Poole v. Paris Mt. Water Co., 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923 (1908).

*Washington.*—Linne v. Bredes, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1068 (1906).

[5] See Wagner v. City of Rock Island, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519 (1893).

[6] See East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393, 6 L. R. A. (N. S.) 198 (1906).

may maintain an action for depreciation of his security by a refusal of service to his mortgagor.[1] Of course if the mortgagor is in possession he is the one entitled to service.[2] The decision that a tenant, as such, is entitled to demand service, does not altogether exclude the landlord from consideration.[3] He has such interest in the supply of the premises that it would seem that he could frame an action for injury to his interests by refusal of the company to furnish a supply to them. It is on some such ground as this that the legislation making the owner liable for supply to his premises may better be justified than in any other way.[4]

**§ 379. Services to separate premises.**

The primary duty is thus to the occupier of premises as such; and the structure therefore would seem to be the unit. The company may insist upon this as well as the applicant. Thus in one leading case[5] the United States as owner of a military reservation at Fort Omaha demanded that all the water supplied should be sold at wholesale rates through one meter. But the court held that the company could insist upon supplying each building separately, saying that this supply to premises was the nature of their obligation. There are, however, some instances of service arranged for by a group as a unit which, it is held, will conclude the parties to the arrangement if any of them are later dissatisfied.[6]

[1] Equitable Securities Co. v. Montrose & D. Canal Co., 79 Pac. 747 (Col., 1905).

[2] Mabb v. Stewart, 133 Cal. 556, 65 Pac. 1085 (1901).

[3] Dayton v. Quigley, 29 N. J. Eq. 77 (1878).

[4] See Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366 (1900).

[5] United States v. American Waterworks Co., 37 Fed. 747. Compare Haugen v. Albina L. & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

[6] *Idaho.*—Helphery v. Perrault, 12 Idaho, 451, 86 Pac. 417 (1906).

*Missouri.*—Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019 (1903).

**§ 380. Supply to buildings divided into tenements.**

It is of interest to see how the problem is handled in accordance with these principles when the basis of supply to a building occupied by several groups of persons is brought in question. If there are various persons occupying the premises, but no separation of the tenancy, the premises may properly be considered as an entirety. A single charge may then be made for all; one lodger cannot demand separate rating [1] when the premises are used in common with a single system of piping. But where the building is divided into separate tenements, there being separate lessees of these apartments, a different situation is presented. Even then it is not the duty of the supplying company to provide rising pipes to each apartment and a meter for the supply at each. As a theoretical matter the profession of the supplying company, a gas company or a water company for example, ends at the cellar wall by its usual practice. Moreover, as a practical matter, the existence of public pipes within the house structure would give too great an opportunity for stealing by tapping the pipes.[2] The proper method for application by a tenant who desires a supply at his apartment is by bringing his own service pipes to the cellar wall and there requesting that a supply be handed over to him.[3] It may be added that where the statute permits the charging of the service against the owner the whole may be billed to him, leaving him to deal with his tenants as he sees fit.[4] These

[1] Birmingham v. Birmingham Waterworks Co., 42 So. 10, 152 Ala. 306, 44 So. 581, 11 L. R. A. (N. S.) 613 (1906). See also Frothingham v. Bensen, 20 N. Y. Misc. 132 (1897).

[2] Ferguson v. Metropolitan Gas Co., 37 How. Pr. 189 (1868). And see Stein v. McArdle, 24 Ala. 344 (1854).

[3] The lessee of two tenements is not liable for supply to his sublessee in one. Young v. Boston, 104 Mass. 95 (1870).

[4] Kelsey v. Board of Fire & Water Commissioners, 113 Mich. 215, 71 N. W. 589 (1897).

difficulties doubtless do not apply to electric supply or telephone service, unless perhaps when the wires are underground; for when the wires are overhead they may be brought directly to the outer wall of the apartment.

*Topic D. Other Limitations to Particular Classes*

**§ 381. When special limitations are justifiable.**

As has just been seen, special limitations upon the extent of the employment may be justified by the particular situation with regard to the service in question. This is particularly true when those who may demand service are plainly limited by external conditions. Where it is true that only a certain class are in a position to demand service the propriety of confining service to that class is obvious. These external limitations may be of various sorts, as will be seen. The service in question may be so dependent upon another service that it may only deal with those who have been first accepted by this other service. Or the service in question may be available by necessary law only to those who have first acquired a legal right entitling them to this service. Illustrations of these two possibilities are included in this topic.

**§ 382. Sleeping and parlor car service.**

The public profession and proper obligation of a sleeping car or parlor car company is subject to this sort of limitation. Its services are tendered, not to all persons who may desire shelter or protection but only to passengers on the train to which they are attached, and indeed only to such passengers as the carrier permits to ride in the cars of the company. As Mr. Justice Devens said, in Lawrence v. Pullman Palace Car Company:[1] "The defendant company could not certainly furnish a berth in its cars until the person requesting it had become entitled to

[1] 144 Mass. 1, 10 N. E. 723, 59 Am. Rep. 58 (1887).

transportation by the railroad company as a passenger, and he must also be entitled to the transportation for such routes, distances, or under such circumstances, as the railroad company should determine to be those under which the defendant company would be authorized to furnish him with its accommodations. The defendant company could only contract with a passenger when he was of such a class that the railroad company permitted the contract to be made." [1]

**§ 383. Right in a public conduit.**

Legal limitation is the true explanation of the restricted obligation attributed to the wire conduit companies by the few cases which deal with this modern instance. It is held as to them that they are only bound to admit the wires of such companies as have received proper franchise from the public authorities to engage in their business along the streets in which the conduit is run.[2] This "lawful power" is a condition prerequisite, otherwise various companies might foist themselves upon the city without its consent.

**§ 384. Irrigation in accordance with water rights.**

The situation as to irrigation companies is altogether peculiar. As has been seen, they are only in public service to a limited extent, but in so far as they are professing to serve takers in general, they are under a public obligation of a certain sort. This obligation is always in con-

[1] *Accord., United States.*—Lemon v. Pullman P. C. Co., 52 Fed. 262 (1887).

*Illinois.*—Pullman P. C. Co. v. Lee, 49 Ill. App. 75 (1892).

[2] See generally:

*Maryland.*—Purnell v. McLane, 98 Md. 589, 56 Atl. 830 (1904).

*Missouri.*—State ex rel. v. National Subway Co., 145 Mo. 551, 46 S. W. 981 (1898).

*New York.*—West Side Electric Co. v. Consol. T. & E. Co., 110 N. Y. App. Div. 171, 96 N. Y. Supp. 609 (1905); Re Long Acre Light & Power Co., 102 N. Y. Supp. 242, 117 N. Y. App. Div. 80 (1907).

nection with landholding. Only those who are in possession of irrigable land within their district can demand service, but more than this, there are usually to be found priorities in right between the different landowners applying for service. The peculiar rule of property within the States where irrigation systems are common, gives a priority, in accordance with the time of appropriation, to the owner of the irrigated land.[1]

**§ 385. Basis of the public duty.**

Citations might have been multiplied upon the topics here discussed; but it is hoped that authority enough has been adduced to support the contention here put forward. It is but a half truth that those who commit themselves to a public employment are bound to serve the whole public. It is but a half truth, that the public servant may altogether decide as to the extent to which he will commit himself to public service. The real truth in this is, that by entering upon the service one comes within the law requiring him to meet the necessities of the situation,—but no more. The obligations are thus the involuntary ones of a legal status,—not the defined ones of a specific assumption.

[1] A few examples of the points under discussion selected almost at random are:

*California.*—Merrill v. Southside Irr. Co., 112 Cal. 426, 44 Pac. 720 (1896); Pallett v. Murphy, 131 Cal. 192, 63 Pac. 366 (1900); Lowe v. Yolo Co. Consol. Water Co., 6 Cal. App. 646, 96 Pac. 379 (1908).

*Colorado.*—People v. Canal Co., 25 Colo. 202, 54 Pac. 626 (1898); Wright v. Platte Valley Irr. Co., 27 Colo. 322, 61 Pac. 603 (1900); Schneider v. People, 30 Colo. 493, 71 Pac. 369 (1903).

*Idaho.*—Wilterding v. Green, 4 Idaho, 773, 45 Pac. 134 (1896).

# CHAPTER XII

## CONDITIONS PRECEDENT TO SERVICE

§ 390. Nature of the conditions precedent.

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## § 390. Nature of the conditions precedent.

When it is said that it is the duty in public service to serve all that apply, that is rather the statement of a general principle than of a practicable rule. In fact there are many conditions precedent to the obligation of a particular public service company to serve a particular applicant.[1] Those who wish service must always put themselves in a proper position to demand service; and until these conditions precedent are complied with, there is no present obligation to serve such persons.[2] Moreover, as another condition precedent there must be tender of the regular compensation, so important a condition that it is discussed separately in the next chapter. Clearly no public service company is bound to undertake service except upon reasonable conditions. Indeed in most services there are conditions precedent to be performed by

[1] For instance the duty of the common carrier of a parcel as baggage is incidental to and grows out of the contract for the transportation of one as a passenger, and does not arise until the person tendering such parcel for carriage has procured the right of transportation as a passenger. Until such right has been procured, a common carrier is under no duty whatsoever to receive a parcel from anyone to be transported as baggage. Atlanta Terminal Co. v. American Baggage & Transfer Co., 125 Ga. 677, 54 S. E. 711 (1906).

[2] A carrier cannot be made liable for the loss or destruction of goods, unless they have been tendered to and accepted by it for transportation. Thus where the proprietor of a tent show loaded part of his outfit in the afternoon into a car furnished by the carrier, retaining the balance for use the following night, it was held that there had been no tender to and acceptance by the carrier for transportation so as to make it liable as a carrier for its loss by accidental fire. Burrowes v. Chicago, B. & Q. Ry. Co. (Neb.), 126 N. W. 1084 (1910).

the particular applicant before a present duty is owed to him, even though he wishes a service in respect to which there has been public profession.

*Topic A. Service Must Be Asked at Proper Time*

**§ 391. Whether carrier must receive goods in advance.**

It seems to have been the rule of the early cases that a carrier, whether by land or sea, could not be compelled to receive goods or freight until he was ready to set out, even if it happened that he had storage facilities or his ship was moored in the port.[1] In modern times, however, it is usually held necessary for the railroads at least, to provide facilities for receiving goods in advance of the departure of their freight trains; and indeed it is now usual for steamboats to have their special wharf premises fitted for the reception of freight; and the carrier in either case may be compelled to receive freight in advance. This is said directly in a leading case: "It is the duty of a public carrier to provide reasonable facilities for the acceptance of property for transportation and to transport the same with due diligence, and this statute prescribes the penalty for failure to do this. The carrier undoubtedly has the right to prescribe reasonable rules and regulations for the delivery to its agents of property for transportation, but it has no right to impose unusual conditions upon a shipper or to require him to undergo unusual expense or trouble in delivering his goods for transportation. It must accept goods tendered for immediate transportation and provide reasonable facilities

[1] Lane v. Cotton, 1 Ld. Rey. 646, 652 (1701), quoting Morse v. Slue, 1 Ventr. 190.

No facilities provided at a railway station for storing baggage before the passenger (or his agent) shall request that it shall be checked, displaying proper tickets. Atlanta Terminal Co. v. American Baggage & T. Co., 125 Ga. 677, 54 S. E. 711 (1906).

for taking care of the same during temporary delays while awaiting shipment." [1]

**§ 392. How long in advance goods must be received.**

This obligation to receive goods in advance is only for a reasonable period.[2] It still remains true that the carrier is not a warehouseman but a carrier by profession. To go into this matter in more detail, there are conflicting decisions as to whether an express company can enforce a rule that money will not be received on any day after the departure of the trains carrying express matter, the idea being that currency should not ever be kept in the local office overnight. In the North Carolina case,[3] the decision was against this regulation of the company, on the general principle that carriers to-day must for the convenience of their patrons accept goods in advance. In the Federal case [4] it was held without denying the general principle, that in this peculiar situation the rule was a reasonable one. It is difficult to choose between these two cases, for since it is a question of reasonableness in a particular case, it is a matter of individual judgment. But the later case is scientific in making the inquiry solely whether the rule established by the company for the conduct of its business is so unreasonable that the court will feel that it must declare it outrageous; and judged by this standard very probably the rule should stand.[5]

[1] Quoted from St. Louis, I. M. & So. Ry. Co. v. State, 84 Ark. 150 (1907).

But this obligation is only to provide requisite facilities for performing the service of carriage. It is no part of the business of a railroad to provide a grain elevator where grain may be stored in large quantities until the owners decide to ship. People v. Illinois Cent. Ry. Co., 233 Ill. 378, 84 N. E. 368 (1908).

[2] Bouker v. Long Island Ry. Co., 89 Hun, 202, 35 N. Y. Supp. 23 (1895).

[3] Alsop v. Southern Exp. Co., 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271 (1889).

[4] Platt v. Lecocq, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558 (1907).

[5] See also Palmer v. London & Southern Ry. Co., L. R. 1 C. P. 588 (1866).

**§ 393. Acceptance long in advance.**

As the carrier is not obliged to accept goods tendered to him upon the basis that they are to be held by him for any considerable time before their transportation is begun, he may make his own stipulation as to the basis upon which he will consent to receive them. His duty is to take and carry, not to receive and store. If he is not tendered the goods for immediate transportation he does not receive them in his capacity as a common carrier. He is in such cases no more than a private warehouseman liable only for due care, not as a carrier liable as an insurer. When therefore goods are received by the carrier, not for immediate transportation but to be held until further orders of the shipper, the carrier holds the goods, pending such orders, as a warehouseman, not as a carrier.[1] And so where the shipping directions are that the goods shall be sent at a later time the carrier until such time holds the goods as a mere warehouseman.[2] On the other hand, if the goods have been taken by the carrier for im-

[1] *Arkansas.*—Little Rock & Fort Smith Ry. Co. v. Hunter, 42 Ark. 200 (1883).

*Massachusetts.*—Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126 (1868).

*Michigan.*—Michigan Southern & N. I. R. R. Co. v. Shurtz, 7 Mich. 515 (1859).

*New Hampshire.*—Moses v. Boston & M. R. R. Co., 24 N. H. 71, 55 Am. Dec. 222 (1851).

*New York.*—Rogers v. Wheeler, 52 N. Y. 262 (1873).

*Ohio.*—Pittsburg, C. & St. L. Ry. Co. v. Barrett, 36 Ohio St. 448 (1881).

*Wisconsin.*—Schmidt v. Chicago & N. W. Ry. Co., 90 Wis. 504, 63 N. W. 1057 (1895).

*England.*—White v. Humphery, 11 Q. B. 43 (1847).

[2] *Massachusetts.*—Fitchburg & W. R. R. Co. v. Hanna, 6 Gray, 539, 66 Am. Dec. 427 (1856).

*Michigan.*—Michigan So. & N. I. R. R. Co. v. Shurtz, 7 Mich. 515 (1859).

*Mississippi.*—Illinois Cent. R. R. Co. v. Troustine, 64 Miss. 834, 2 So. 255 (1887).

*Missouri.*—Goodbar v. Wabash Ry. Co., 53 Mo. App. 434 (1893).

*New York.*—Spade v. Hudson R. R. R. Co., 16 Barb. 383 (1853).

*North Carolina.*—Basnight v. Atlantic & N. C. R. R. Co., 111 N. C. 592, 16 S. E. 323 (1892).

*Canada.*—Ham v. McPherson, 6 Upp. Can. Q. B. (O. S.) 360 (1871).

mediate transportation he then becomes liable as a common carrier although transportation has not begun.[1] If the carrier delays transportation thereafter to suit his own convenience that is no affair of the shipper. But if there is an agreement whereby the goods placed in the carrier's care are to be held until he chooses to begin transportation the rule is otherwise.[2]

**§ 394. Goods tendered too late.**

On the other hand, the carrier by rail may require that freight be delivered to it at a time sufficiently prior to the departure of its trains to enable it to make preparations for shipment. Thus, in Frazier v. Kansas City, St. Joe & Council Bluffs Railway,[3] where a complaint was made against a railroad for not forwarding freight offered, it was proved that the cattle in question had not arrived at the station when the train was being loaded, but that

[1] This general principle is shown by the following cases:

*United States.*—St. Louis, I. M. & S. Ry. Co. v. Knight, 122 U. S. 79, 30 L. ed. 1077, 7 S. Ct. 1132 (1887).

*Connecticut.*—Merriam v. Hartford & N. H. R. R. Co., 20 Conn. 354, 52 Am. Dec. 344 (1850).

*Illinois.*—Grand Tower M. & Transp. Co. v. Ullman, 89 Ill. 244 (1878).

*Indiana.*—Louisville, N. A. & C. Ry. Co. v. Godman, 104 Ind. 490, 4 N. E. 163 (1885).

*Minnesota.*—Shaw v. Northern Pac. R. R. Co., 40 Minn. 144, 41 N. W. 548 (1889).

*Missouri.*—Mason v. Missouri Pac. Ry. Co., 25 Mo. App. 473 (1887).

*New Hampshire.*—Moses v. Boston & Maine R. R. Co., 24 N. H. 71, 55 Am. Dec. 222 (1851).

*New York.*—Ames v. Fargo, 114 App. Div. 666, 99 N. Y. Supp. 994 (1906).

*Pennsylvania.*—Clarke v. Needles, 25 Pa. St. 338 (1855).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948 (1891).

[2] Fitchburg & W. R. R. Co. v. Hanna, 6 Gray (Mass.), 539, 66 Am. Dec. 427 (1856), *semble.*

See also Fort Worth & D. C. Ry. Co. v. Riley (Tex. App.), 1 S. W. 446 (1886).

[3] 48 Ia. 571 (1878).

Cronkite v. Wells, 32 N. Y. 247 (1865), *accord.*

But see St. Louis, I. M. & S. Ry. Co. v. Ozier, 86 Ark. 179, 110 S. W. 593, 17 L. R. A. (N. S.) 327 (1908), where the cattle were held near by at the request of the station agent.

the shipper had sent ahead and requested that the train be held until he could get his cattle to the station and load them; it was decided that the railroad was not liable. Mr. Justice Day said: "A delay of a few minutes at one station might occasion a corresponding delay of every train on the line of road; and even result in accidents destructive of property and life. No person desiring to become a passenger upon a train could rightfully demand a delay of one minute to enable him to reach the train and get on board. Upon what principle, then, can these plaintiffs demand damages because the defendant's train did not wait until they could drive their hogs into defendant's yard, load four cars, count them, have way-bill made out, shipping contract signed, and the hogs placed in the train?" [1]

### § 395. Passengers must come at proper time.

A passenger also must present himself for carriage and enter the train at the proper time, neither too early nor too late. He cannot force himself on the railroad as a passenger by entering the car prematurely. Thus, he does not become a passenger by entering the car before it has been placed in a position in which passengers are to be received,[2] or by entering the car, even if it is at the

[1] In Chicago, R. I. & P. Ry. Co. v. Risley Bros. Co. (Tex. Civ. App.), 119 S. W. 897 (1909), it was held that one who had stone which he wished to pass through his crusher into cars was not one tendering freight for shipment.

A requirement that in order to have a car-load shipment go forward the same day the goods must be delivered before a certain hour will govern unless it is waived. Central of Ga. Ry. Co. v. Butler Marble & G. Co. (Ga.), 68 S. E. 775 (1910). See Wilder v. St. Johnsbury & L. C. R. R. Co., 66 Vt. 636, 30 Atl. 41 (1891), where although preparations had been made for shipment there had not been any tender as yet.

[2] *United States.*—Farley v. Cincinnati, H. & D. R. R. Co., 108 Fed. 14, 47 C. C. A. 156 (1901).

*Georgia.*—Curry v. Georgia M. & G. R. R. Co., 92 Ga. 293, 18 S. E. 422 (1893).

*Missouri.*—Archer v. Union Pacific Ry. Co., 110 Mo. App. 349 (1909).

proper position at the station, if it is not yet ready for passengers.[1] Similarly, a person who reaches a train after it begins to move has no right to be received, and if he attempts to board he is not a passenger.[2] In passing upon exceptions in a case of this sort the governing principle was stated by the South Carolina court thus: "The railroad company owes no duty to a belated passenger to stop its train in any other manner than that required by the statute. A contrary doctrine would tend to disarrange the schedule of the railroad company, and thus enhance the danger to the travelling public." [3]

**§ 396. Services which may be demanded at any time.**

There are certain services which, it seems, may properly be demanded at any time of the day or night. The innkeeper particularly cannot refuse to receive a traveler because he comes late at night—that is the very time when the weary wayfayer needs the protection of the inn.[4] Similarly it is generally held that ferrymen could not refuse to take travelers over after nightfall.[5] And this would doubtless be true of turnpikes and toll bridges.

[1] *Alabama.*—Brown v. Scarboro, 97 Ala. 316, 12 So. 289 (1893).

*North Carolina.*—Hodges v. New Hanover Transit Co., 107 N. C. 576, 12 S. E. 597 (1890); Tillett v. Lynchburg & D. R. R. Co., 115 N. C. 662, 20 S. E. 480 (1894).

[2] *Illinois.*—Illinois Cent. R. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 61 Am. St. Rep. 68 *n.*, 39 L. R. A. 148 (1897).

*Massachusetts.*—Merrill v. Eastern R. R. Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705 (1885).

*Mississippi.*—Georgia Pac. Ry. Co. v. Robinson, 68 Miss. 643, 10 So. 60 (1891).

[3] *South Carolina.*—Pickett v. Southern Ry. Co., 69 S. C. 445, 48 S. E. 466 (1904), citing Creech v. Char. & West Car. Ry. Co., 66 S. C. 528, 45 S. E. 86 (1903).

But in Hickinbottom v. Delaware, L. & W. R. R. Co., 15 N. Y. St. Rep. 11, 54 Sup. Ct. 639 (1888), it was held that if a passenger presents himself before the train starts, it is the duty of the railroad to hold the train until he gets on.

[4] Rex v. Ivens, 7 Car. & P. 213 (1835).

[5] Pate v. Henry, 5 Stew. & P. 101 (1833).

The necessities and accidents of travel are such that those who cater to travelers must expect to serve at unusual hours at times. To pursue this point farther, there are various other services than those just mentioned in which those who conduct them must be ready to give service at all times—day and night, secular days and holidays. Water supply and sewerage service are two examples as to which there can be no question. But even as to municipal services of this sort there may be communities where the business is so small, relatively, that the public cannot fairly demand continuous service. Thus in the smaller towns the electric station is sometimes not operated in the daytime; and there are some communities where telephone service is discontinued at night.

**§ 397. Time-tables.**

It is of course very common to find in the conduct of a public service regulations made which will govern the times at which service will be rendered. Thus common carriers of passengers very generally publish their tables setting forth the intervals at which they will perform their service, and these regulations will be supported unless they are unreasonable.[1] What is reasonable in this respect is much discussed later. It is sufficient at this stage to point out that such regulations, if not unreasonable, govern the situation, and excuse the proprietors from performance at other times. As this matter is fully

[1] See particularly:

*Indiana.*—Ohio & M. Ry. Co. v. Swarthout, 67 Ind. 567, 33 Am. Rep. 104 (1879).

*Massachusetts.*—Sears v. Eastern R. R. Co., 14 Allen, 433, 92 Am. Dec. 780 (1867).

*Michigan.*—Van Camp v. Michigan Cent. R. R. Co., 137 Mich. 467, 100 N. W. 771 (1904).

*New Hampshire.*—Gordon v. Manchester & L. R. R. Co., 52 N. H. 596, 13 Am. Rep. 97 (1873).

*Oklahoma.*—Noble v. Atchison, T. & S. F. R. R. Co., 4 Okla. 534, 46 Pac. 483 (1896).

*Wisconsin.*—Schiffler v. Chicago & N. W. Ry. Co., 96 Wis. 141, 71 N. W. 97, 65 Am. St. Rep. 35 (1897).

treated in another connection a cross reference to the discussion will be sufficient here.[1]

**§ 398. Office hours.**

In many public employments office hours are established to which the public profession is limited. Whether these regulations are reasonable is again a question for discussion later. It is well settled, for instance, that a telegraph company may insist upon its office hours, provided the time within which messages will be received is not made unduly short.[2] If it appears that the hours established are not unreasonable, the companies will be excused from serving at other times, and the public must confine its demands to the established hours if these have been made known with proper publicity.[3] The same law prevails in common carriage, as will be seen. Thus a railroad may establish reasonable hours for having its waiting rooms open.[4] And it may have reasonable rules as to when its ticket offices will be open.[5]

[1] See generally § 872, *infra*.

[2] See particularly:

*Arkansas*.—Western Union Telegraph Co. v. Love Banks Co., 73 Ark. 205, 83 S. W. 949 (1904).

*Indiana*.—Western Union Telegraph Co. v. Harding, 103 Ind. 505, 3 N. E. 172 (1885).

*Kentucky*.—Western Union Telegraph Co. v. Crider, 107 Ky. 600, 54 S. W. 963 (1900).

*North Carolina*.—Carter v. Telegraph Co., 141 N. C. 374, 54 S. E. 274 (1906).

*South Carolina*.—Bonner v. Western Union Telegraph Co., 71 S. C. 303, 51 S. E. 117 (1904).

*West Virginia*.—Davis v. Western Union Telegraph Co., 46 W. Va. 48, 32 S. E. 1026 (1899).

[3] See generally § 874, *infra*.

[4] See particularly:

*United States*.—Grimes v. Pennsylvania R. R. Co., 36 Fed. 72 (1888).

*Alabama*.—Alabama G. S. Ry. Co. v. Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354 (1887).

*Indiana*.—Draper v. Evansville & T. H. R. R. Co., 165 Ind. 117, 74 N. E. 889 (1905).

*Illinois*.—Chicago & A. Ry. Co. v. Walker, 118 Ill. App. 397 (1905).

*North Carolina*.—Phillips v. Southern Ry. Co., 124 N. C. 123, 32 S. E. 388 (1899).

*Oregon*.—Abbot v. Oregon Ry. & Nav. Co., 46 Oreg. 549, 80 Pac. 1012 1 L. R. A. (N. S.) 851 (1905).

[5] See generally § 873, *infra*.

*Topic B. Service Must Be Demanded at Proper Place*

**§ 399. Tender of goods to the carrier.**

By the general principle under discussion a carrier is not liable for refusing to take goods unless they have been actually tendered [1] or at least unless they are in the process of being tendered.[2] But the tender or the attempt to tender will subject the carrier to no liability unless the tender is made at a proper place. Usually the place which the carrier has designated in the particular instance must be resorted to, as where a carrier gave orders that coal should only be received at a certain siding.[3] It should be added that as the carrier may make regulations with regard to its performance of its obligations, it may refuse to take goods except at the stations which it has established.[4] Tender at an unusual place will not be sufficient, as where goods are deposited near to the right of way of the railroad and demand made that the goods should be taken up where they lie.[5] But a railroad may actually consent to accept the goods, thus in one case [6] where the shipper in accordance with an

[1] Little Rock & F. S. Ry. Co. v. Conatser, 61 Ark. 560, 33 S. W. 1057 (1896).

[2] Houston, E. & W. T. Ry. Co. v. Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225 (1898).

[3] Robinson v. Baltimore & O. R. R. Co., 129 Fed. 753, 64 C. C. A. 281 (1904). See also Harp v. Choctaw, O. & G. R. R. Co., 125 Fed. 445, 61 C. C. A. 405 (1903).

[4] Weeks v. New Orleans, S. F. & L. Ry. Co., 40 La. Ann. 800, 5 So. 72, 8 Am. St. Rep. 560 (1888). See also Kellogg v. Suffolk & C. Ry. Co., 100 N. C. 158, 5 S. E. 379 (1888).

[5] *Arkansas.*—St. Louis, I. M. & S. Ry. Co. v. Lee, 69 Ark. 584, 65 S. W. 99 (1901).

*Georgia.*—Wilson v. Atlanta & Charlotte Ry. Co., 82 Ga. 386 (1889).

*Mississippi.*—Tate v. Yazoo & M. V. R. R. Co., 78 Miss. 842, 29 So. 392, 84 Am. St. Rep. 649 (1901).

*New York.*—Spade v. The Hudson River R. R. Co., 16 Barb. 383 (1853).

*South Carolina.*—Brown v. Atlanta & C. A. L. Ry. Co., 19 S. C. 39.

*Texas.*—Yoakum v. Dryden (Tex. Civ. App.), 26 S. W. 312 (1894).

[6] St. Louis, I. M. & So. Ry. Co. v. Wynne H. & C. Co., 81 Ark. 373, 99 S. W. 375 (1907).

arrangement with the railroad, had wood upon a siding ready for transportation, some of which was already in the custody of the railroad, it was properly held that the shipper could recover for the damage caused by the failure to take the remainder of the shipment.[1] And in another case it was rightly considered that a sufficient tender of stock to a carrier for shipment had been made by notifying the carrier of the need of cars, and keeping the stock within a short distance of the station in obedience to instructions of the station agent.[2] After a car has been loaded at a place designated by the railroad, the shipper having done everything which the railroad has required it cannot refuse to take it, because it would not usually be compelled to take freight at that point unless it had waived the condition.[3] Moreover, the actual tender of the freight is waived altogether where the railroad has refused to enter an order for cars.[4]

**§ 400. Placing goods in proper position not delivery.**

Similarly it is not a sufficient delivery to the carrier merely to place the goods in a place where he may con-

See also Georgia S. & F. Ry. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961 (1904).

[1] Durden v. Southern Ry. Co., 58 S. E. 299 (Ga. Ct. App., 1907).

See also Arthur v. Texas & P. Ry. Co., 204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. 338 (1907).

[2] See also St. Louis, I. M. & S. Ry. Co. v. Ozier, 86 Ark. 179, 110 S. W. 593, 17 L. R. A. (N. S.) 327 (1908). But see Louisville, N. A. & C. Ry. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674 (1887).

[3] W. B. Garrison Co. v. Southern Ry. Co., 150 N. C. 575, 64 S. E. 578 (1909).

[4] Atlantic C. L. Ry. Co. v. Geraty, 166 Fed. 10, 91 C. C. A. 602, 20 L. R. A. (N. S.) 310 (1908).

While goods are being loaded upon a car upon a siding by the shipper the railroad cannot be regarded as having assumed the liability of a common carrier as yet. Burrowes v. Chicago, B. & Q. R. R. Co., 85 Neb. 497, 123 N. W. 1028 (1909).

But after a railroad has actually taken possession of goods between stations and transportation has begun it is of course liable as a common carrier. Santa Fe, P. & P. Ry. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910).

veniently get them,[1] as at the wharf from which he sails,[2] or the inn from which his coach starts,[3] the station from which his train starts,[4] or a warehouse on the premises.[5] There must be notification to the carriers that the goods have been so deposited, and following that something by way of acceptance.[6] Of course the case is correct which held that a delivery to a railroad warehouse, about dark, and after it was closed and locked for the night by plaintiff's agent, by opening the upper door and thereby putting the goods in, there being no one in charge, did not show such delivery as would charge the railroad.[7] One of the leading cases on this subject is hardly less plain. A cutter was placed upon a platform of a freight station and the proper agent notified, but it was carelessly placed so that it projected over the tracks and was struck and injured by a passing train. The court held that the delivery was not as perfect and complete as it should have been, and that the carrier had never come into possession of the cutter.[8]

**§ 401. Passengers must be upon the premises.**

A carrier of passengers owes no duty to persons, whatever their intentions, who have not presented themselves at his premises.[9] Intending passengers cannot force a railroad to accept them except at the place which the

[1] O'Bannon v. Southern Exp. Co., 51 Ala. 481 (1874).

[2] Buckman v. Levi, 3 Camp. 414 (1813).

[3] Selway v. Holloway, 1 Ld. Ray. 46 (1695).

[4] Slim v. Great Northern Ry. Co., 14 C. B. 647 (1854).

[5] Spofford v. Pennsylvania R. R. Co., 11 Pa. Super. Ct. 97 (1899).

[6] Bowie v. Balt. & Ohio R. R. Co., 1 MacArthur, 609 (1874).

[7] Spofford v. Pennsylvania R. R. Co., 11 Pa. Super. Ct. 97 (1899).

[8] Grosvenor v. New York Cent. R. R. Co., 39 N. Y. 34 (1868).

[9] Nashville Street Ry. Co. v. Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451 (1900).

See also Kroeger v. Seattle Electric Co., 37 Wash. 544, 79 Pac. 1115 (1905), people waiting at the car barn.

railroad has designated.[1] One walking along the public street toward the station with the intention of taking the train is certainly not yet a passenger.[2] He has done nothing to notify any of the officers or agents of the company that he was even a prospective passenger. Nor is one a passenger who is proceeding across the track directly from the street to the train.[3] In such a case the intending passenger must at least have been received on the premises of the company before proceeding upon the tracks if he is to be regarded as a passenger. One who, merely in order to reach in the quickest way the platform from which his train starts, crosses the carrier's tracks on his way from the sidewalk to the train, cannot be regarded as a passenger.[4] But an intending passenger who has bought a ticket, or is prepared to pay fare, and is passing over tracks of the company, under direction of its servants, or according to custom, toward the train which he is about to take, has been held to be a passenger.[5] These are representative cases; no attempt is made to marshal the many cases upon these points.

**§ 402. When passengers are accepted.**

The relation of carrier and passenger may arise before actual transportation has begun. A person who has entered a vehicle which is ready to start becomes a pas-

[1] Spannagle v. C. & A. R. R. Co., 31 Ill. App. 460 (1889).

See also Smith v. Birmingham Ry., L. & P. Co., 147 Ala. 702, 41 So. 307 (1906), boarding car between stations.

[2] Southern Ry. Co. v. Smith, 86 Fed. 292, 30 C. C. A. 58, 40 L. R. A. 746 (1898).

[3] June v. Boston & Albany R. R. Co., 153 Mass. 79, 26 N. E. 238 (1891).

[4] *Illinois.*—Chicago & E. I. R. R. Co. v. Jennings, 190 Ill. 478, 60 N. E. 818, 54 L. R. A. 827 (1901).

*Massachusetts.*—Webster v. Fitchburg R. R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521 (1894).

[5] *Iowa.*—Allender v. Chicago, R. I. & P. R. R. Co., 37 Ia. 264 (1873).

*Massachusetts.*—Warren v. Fitchburg R. R. Co., 8 Allen, 227, 85 Am. Dec. 700 (1864).

senger, though the vehicle has not yet started.[1] So one who is on a steamboat moored to a wharf is a passenger, though the boat has not yet started.[2] Those who are in the waiting room of a railroad station, waiting to take the carrier's car, are usually said to be passengers.[3] The essential elements are summarized thus in a recent case.[4] "A person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take it."

**§ 403. Establishment of regular stations.**

In the absence of action of the company establishing stations, and making it a condition of receiving persons or goods that they should present themselves or be offered at a station, it would seem clear that the carrier could not refuse a tender made at any point on his route. Such was undoubtedly the case with the earlier carriers, the wagoners, the coachmen; and in fact it remains so as to such carriers. But in the operation of modern railroads the establishment of stations was found necessary from the first. And indeed regular stopping places

[1] *New York.*—Gyle v. Joline, 120 N. Y. Supp. 761 (1910).

*England.*—Massiter v. Cooper, 4 Esp. 260 (1803).

[2] *United States.*—Hrebrik v. Carr, 29 Fed. 298 (1886).

*New York.*—Dougherty v. New York Cent. & H. R. R. R. Co., 86 N. Y. Supp. 746 (1904).

[3] *Indiana.*—Pere Marquette R. R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 20 L. R. A. (N. S.) 1041 (1908).

*Mississippi.*—Metcalf v. Yazoo & M. V. Ry. Co. (Miss.), 52 So. 355 (1910).

*New York.*—Gordon v. Grand St. & N. R. R. Co., 40 Barb. 546 (1863).

*Virginia.*—Norfolk & W. R. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935 (1893).

[4] Devens, J., in Heinlein v. Boston & P. R. R. Co., 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676 (1888).

See also the language in Riley v. Vallejo Ferry Co., 173 Fed. 330 (1909).

after some experience have been found to be necessary in the case of street railways. These stations should of course be established at reasonable intervals if this regulation is to stand; whether there has been reasonable provision in this respect is discussed elsewhere.[1] But granted that stations have been properly established, it is a reasonable regulation that passengers shall present themselves and freight shall be tendered at such stations and nowhere else.[2]

**§ 404. Service at private sidings.**

Generally speaking one who has freight to ship must bring it to the established freight stations. No matter how large the business of a particular shipper may be, he cannot insist upon having cars handled from his private switch.[3] And certainly in any particular case the rights of the railroad are so far paramount that a showing that

[1] See generally §§ 804–814, *passim*.

[2] See particularly:

*United States.*—Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. 246 (1909).

*Arkansas.*—St. Louis, I. M. & S. Ry. Co. v. Lee, 69 Ark. 584, 65 S. W. 99 (1901).

*Indiana.*—Louisville Ry. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674 (1887).

*Iowa.*—Frazier & Co. v. Kansas City, St. J. & C. B. Ry. Co., 48 Ia. 571 (1878).

*Louisiana.*—Weeks v. New Orleans, S. F. & L. Ry. Co., 40 La. 800, 5 So. 72, 8 Am. St. Rep. 560 (1888).

*Mississippi.*—Kansas City, M. & B. Ry. Co. v. Lilly (Miss.), 8 So. 644 (1891).

*North Carolina.*—Kellogg v. Suffolk, etc., Ry. Co., 100 N. C. 158, 5 S. E. 379 (1888), *semble*.

*South Carolina.*—Brown v. Atlanta & C. A. L. Ry. Co., 19 S. C. 39 (1882).

As to the situation in regard to street railways at the present time, see:

*Massachusetts.*—Lockwood v. Boston Elevated Ry. Co., 200 Mass. 537, 86 N. E. 934 (1909).

*Tennessee.*—Nashville Street Ry. Co. v. Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451 (1900).

[3] *United States.*—Bedford B. G. S. Co. v. Oman, 134 Fed. 441 (1904).

*Georgia.*—Darden v. Southern Ry. Co., 2 Ga. App. 66, 58 S. E. 299 (1907).

*Michigan.*—Mann v. Pere Marquette R. R. Co., 135 Mich. 210, 97 N. W. 721 (1903).

*South Carolina.*—Mays v. Sea-

the operation of a switch connection might be dangerous will be fatal to the application.[1] There are extreme cases, as will be seen later, where it would be unreasonable to enforce this usual regulation that all must bring their freight to the stations. For peculiar shipments, such as coal and ore, grain and oil—to give four examples [2]—special acceptance along the tracks at private sidings is apparently necessary. In recent times the attempt is being made to extend the obligation to permit switch connections by legislation, but as will be seen later much of this is unconstitutional.[3]

**§ 405. Service only obligatory within proper territory.** It has already been pointed out in another connection

board Air L. Ry. Co., 75 S. C. 455 (1906).

Discussed generally in § 814.

[1] *United States.*—Jones v. Newport N. & M. V. R. R. Co., 65 Fed. 736, 31 U. S. App. 92, 13 C. C. A. 95 (1895); Mercantile Trust Co. v. Columbus S. & H. R. R. Co., 90 Fed. 148 (1898).

*North Carolina.*—Industrial Siding Case, 140 N. C. 239, 52 S. E. 941 (1905).

[2] *United States.*—Harp v. Choctaw, O. & G. R. R. Co., 125 Fed. 445, 61 C. C. A. 405 (1903), collieries; Olanta Coal M. Co. v. Beech Creek R. R. Co., 144 Fed. 150 (1906), collieries.

*Illinois.*—Vincent v. Chicago & A. R. R. Co., 49 Ill. 33 (1868), grain elevators; Chicago & N. W. Ry. Co. v. People, 56 Ill. 365 (1870), grain elevators.

*Iowa.*—Richmond v. Dubuque & Sioux City R. R. Co., 26 Ia. 191 (1868), grain elevators.

*Kentucky.*—Bedford-Bowling Green Stone Co. v. Oman, 115 Ky. 369, 73 S. W. 1038, 24 Ky. L. Rep. 2274 (1903), quarries.

*Nebraska.*—Roby v. State ex rel. Farmers' G. & L. S. Co., 76 Neb. 450, 107 N. W. 766 (1906), grain elevators.

*Pennsylvania.*—Continental Coal Co. v. Pennsylvania R. R. Co., 13 Pa. Dist. Ct. 702 (1904), collieries.

Discussed generally in § 816.

[3] *United States.*—Missouri Pac. Ry. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. 130 (1896).

*Arkansas.*—St. Louis, I. M. & So. Ry. Co. v. Wynne H. & C. Co., 81 Ark. 373, 99 S. W. 375 (1907).

*Louisiana.*—Railroad Commission of La. v. Kansas City So. Ry. Co., 111 La. 133, 35 So. 487 (1903).

*North Carolina.*—Industrial Siding Case, 140 N. C. 239, 52 S. E. 941 (1905).

*South Carolina.*—Mays v. Seaboard Air Line Ry. Co., 75 S. C. 455 (1906).

*Washington.*—Northwestern W. Co. v. Oregon Ry. & Nav. Co., 32 Wash. 218, 73 Pac. 388 (1903).

that the obligation of a company serving a community has its limitations.[1] One demanding a household service, such as water, gas, electricity or telephone, of a company must show that his premises are located within the territory which the company has professed to serve, unless he can show that the territorial limits fixed by the company in question are unreasonable in view of all the circumstances. Here again the company may waive this condition in particular cases and be subject in that service to the liabilities resting upon those engaged in public service without, however, becoming obliged to serve others.[2]

**§ 406. Services to abutting owners.**

That the supplying companies are under a general obligation to supply all householders living within the district which the company has professed to serve is therefore plain. But there are conditions precedent to these services, also, which it will be reasonable for the company to impose, under the circumstances. The service of such householders is undertaken at the premises,

Discussed generally in §§ 818, 819.

[1] See generally §§ 373–380, *passim*.

[2] See particularly:

*United States.*—Cumberland Telephone Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268 (1908).

*Connecticut.*—Town of West Hartford v. Board of Water Commissioners, 68 Conn. 323, 36 Atl. 786 (1896).

*Idaho.*—Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518 (1900).

*Kansas.*—Crouch v. Arnett, 71 Kans. 49, 79 Pac. 1086 (1905).

*Massachusetts.*—Weld v. Gas & Electric Light Commissioners, 197 Mass. 556, 84 N. E. 101 (1908).

*New York.*—Jones v. Rochester Gas & Electric Co., 7 N. Y. App. Div. 465, 39 N. Y. Supp. 1105 (1896).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

*Pennsylvania.*—Central D. & P. Telegraph Co. v. Commonwealth, 114 Pa. St. 592, 7 Atl. 926 (1886).

*West Virginia.*—Charleston Nat. Gas Co. v. Lowe & B., 52 W. Va. 662, 44 S. E. 410 (1901).

and the applicant must be ready with his piping or his wiring, as the case may be, properly arranged to receive the supply at the outer wall.[1] As has been seen, the supply companies undertake their service generally only to those applicants whose premises are properly equipped so as to receive the service in question.[2] It seems that the supplying company should provide the service pipe as part of the facilities for rendering service which it is bound to supply;[3] but there are cases to the contrary.[4] It seems also that the supply company ought to provide the meter,[5] but there are cases to the contrary.[6]

*Topic C. There Must Be Application in Proper Form*

**§ 407. Applicant must give notice.**

Those who have goods in readiness for transportation must notify the carrier of their desire to have their goods transported before he will be in default for not taking them. It has indeed been asserted by the Supreme Court of New York,[7] that a delivery in accordance with any custom must always be accompanied by notice to some authorized agent of the company; but this, as will be seen, undoubtedly goes too far. This elementary principle is further elaborated in the law of innkeeping. The burden appears to be on the traveler to give notice

[1] See particularly Ferguson v. Metropolitan Gas Light Co., 37 How. Pr. 189 (1868).

See generally § 380, *infra*.

[2] See particularly Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482 (1904).

See generally § 823, *infra*.

[3] See particularly Bothwell v. Consumers' Co., 13 Idaho, 568, 92 Pac. 533 (1907).

See generally § 824, *infra*.

[4] See particularly:

Prindiville v. Jackson, 79 Ill. 337 (1875).

See generally § 824, *infra*.

[5] See particularly Red Star Steamship Co. v. Jersey City, 45 N. J. L. 246 (1883).

See generally § 825.

[6] See particularly Cooper v. Goodland, 80 Kans. 121, 102 Pac. 244, 23 L. R. A. (N. S.) 410 (1909).

See generally § 825.

[7] Packard v. Getman, 6 Cow. (N. Y.) *757, 16 Am. Dec. 475 (1827).

to the innkeeper that he desires to be received as a guest. Thus where a person was traveling at night, and came to an inn after it was shut up for the night, and knocked, it was held that the innkeeper must, in order to be liable for not admitting the guest, have heard the knocking.[1] Not only must the applicant give notice that he desires service, but he must designate what service he desires. Thus a passenger may be refused transportation who asked to pay his fare says he has not decided how far he will go.[2] And so a carrier of goods may refuse to take parcels not properly addressed.[3]

**§ 408. Requisitions made in advance.**

Notification may properly be made in advance so that the facilities may be at hand at the time desired. Thus a shipper intending a considerable shipment in car lots may apply a reasonable time in advance to the railroad particularly requesting a certain number of cars in readiness for certain freight at a certain day, and at a certain station.[4] What is reasonable by way of notifica-

[1] Hawthorn v. Hammond, 1 C. & K. (Eng.) 404 (1844).

[2] Fulton v. Grand Trunk Ry. Co., 17 Upp. Can. Q. B. 428 (1858).

If the shipper's misstatements as to the contents of a box caused the carrier to omit the performance of some attention which the goods required, whereby they were lost, it would not be responsible for such loss. St. Louis Southwestern Ry. Co. of Texas v. Ray (Tex. Civ. App.), 127 S. W. 281 (1910).

[3] Grocery Co. v. Railroad Co., 136 N. C. 396, 48 S. E. 801 (1904).

No excuse for refusal to receive freight that name of station is misspelled. Reid & B. v. Southern Ry. Co., 149 N. C. 423, 63 S. E. 112 (1908).

[4] See on the general principle:

*Illinois.*—Chicago & Alton R. R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70 (1879); Illinois Cent. R. R. Co. v. Bundy, 97 Ill. App. 202 (1901).

*Indiana.*—Lake Shore & M. S. Ry. Co. v. Anderson, 39 Ind. App. 112, 79 N. E. 381 (1906); Pittsburgh, C., C. & St. L. Ry. Co. v. Wood (Ind. App.), 84 N. E. 1009 (1908).

*New York.*—Tierney v. New York C. & H. R. R. R. Co., 76 N. Y. 305 (1879).

*Wisconsin.*—Ayres v. Chicago &

tion is well brought out by a recent case,[1] where it was held that a carrier is not required to hold at a wharf station for a whole week a large number of cars awaiting the arrival of a steamship. Indeed it is generally held as to car shipments that when a shipper requires a car at a railroad station for his exclusive use, he must necessarily give notice to the railroad company, after which it will have a reasonable time in which to furnish the car.[2] A correlative duty rests upon the railroad to serve all applicants making proper requisitions for service in proper order without discrimination.[3]

**§ 409. Effect of mere notification.**

It would be going to an extreme to hold as some cases do that a deposit in the regular place for receiving goods followed by notice to the carrier is enough to make the carrier responsible as such, even without proof of a special custom to that effect.[4] But generally speaking for a proper delivery to a carrier by mere deposit of the

Northwestern Ry. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 (1888).

[1] Di Giorgio I. & S. S. Co. v. Pennsylvania R. R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108 (1906).

[2] Illinois Cent. R. R. Co. v. Bundy, 97 Ill. App. 202 (1901).

[3] Ocean S. S. Co. v. Savannah L. W. & S. Co., 131 Ga. 831, 63 S. E. 577 (1909); Merchants' & M. Tr. Co. v. Granger & L., 132 Ga. 167, 63 S. E. 700 (1909).

The cases are very exacting as to the requisition for service especially when the suit is for a statutory penalty. Not only must the application be within the terms of the statute. McDuffie v. Seaboard A. L. Ry. Co., 145 N. C. 397, 59 S. E. 122 (1908); Griffith v. Texas & N. O. Ry. Co. (Tex. Civ. App.), 116 S. W. 648 (1909). But it must not be either too general or too specific. Simmons v. Seaboard A. L. Ry. Co., 133 Ga. 635, 66 S. E. 783 (1909); Cox v. Missouri, K. & T. Ry. Co., 81 Kans. 186, 106 Pac. 41 (1909); Chicago, R. I. & P. Ry. Co. v. Risley Bros. & Co. (Tex. Civ. App.), 119 S. W. 897 (1909); Texas & P. Ry. Co. v. Hughes, 99 Tex. 533, 91 S. W. 567 (1906).

[4] Rogers v. Long Island R. R. Co., 2 Lans. (N. Y.) 269 (1869).

Anderson v. Mobile & O. R. R. Co. (Miss.), 38 So. 661 (1905), *contra*.

goods in a certain place, it will be necessary to show a custom to that effect and the giving of notice following the deposit of the goods will usually be found to be part of that custom.[1] It is, however, not impossible that the custom shown may go so far as to show acceptance by the mere deposit without any notification at all.[2] But at all events the contention sometimes made that by the deposit the carrier becomes liable as a warehouseman from the outset and as a carrier after notification would seem to be untenable.[3]

**§ 410. Signal to passenger carrier.**

In the case of passenger carriers it is not uncommon to provide for the giving of a signal by the intending passenger. Thus the smaller stations are often designated by the railroad as flag stations where the signal must be set by the passenger. The law is positive that a railroad company is bound to stop its trains in response to proper signals at a flag station at which the train is scheduled to stop.[4] As street railways are operated they owe a duty

[1] *Alabama.*—Green v. Louisville & N. R. R. Co. (Ala.), 50 So. 937 (1909).

*Connecticut.* — Trowbridge v. Chapin, 23 Conn. 595 (1855).

*Michigan.*—Wright v. Caldwell, 3 Mich. 51 (1853).

*Missouri.*—Holland v. Chicago, R. I. & P. Ry. Co., 139 Mo. App. 702, 123 S. W. 987 (1910).

[2] *Alabama.*—Montgomery & E. Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54 (1882).

*Connecticut.*—Merriam v. Hartford & N. H. R. R. Co., 20 Conn. 354 (1850).

*Indiana.*—Evansville & T. H. R. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296 (1893).

*Iowa.*—Green v. Milwaukee & S. P. R. R. Co., 38 Ia. 100 (1874).

[3] Yoakum v. Dryden (Tex. Civ. App.), 26 S. W. 312 (1894). But see Basnight v. Atlantic & N. C. R. R. Co., 111 N. C. 592, 16 S. E. 323 (1892).

[4] *Georgia.*—Southern Ry. Co. v. Wallis, 133 Ga. 553, 66 S. E. 370 (1909).

*Michigan.*—Freeman v. Detroit, M. & M. R. R. Co., 65 Mich. 577, 32 N. W. 833 (1887).

*Mississippi.*—Yazoo & M. V. Ry. Co. v. White, 82 Miss. 120, 33 So. 970 (1903).

*Texas.*—San Antonio & A. P. Ry. Co. v. Safford (Tex. Civ. App.), 48 S. W. 1105 (1898).

to the public to stop at their regular crossings on a seasonable signal, given in any intelligible way, to receive those desiring passage.[1] Consequently, a rule of a street railway company, that where its cars stop beyond the crossing they will not be backed even to take a person who has properly signaled, will not protect it from suit by an intending passenger who is left behind.[2] On the other hand, in accordance with all general principles of reponsibility which prevail generally in public service law a railroad company is not liable to one intending to become a passenger for a failure to stop a passenger train at a flag station where the engineer and fireman in charge of the locomotive, through no fault of their own, and while in the exercise of due care on their part, failed to see and obey the signal on account of the manner in which it was given, or by reason of prevailing atmospheric conditions.[3]

## § 411. Formal application for supply.

It is well established that before being obliged to install its service a supplying company, be it water, irrigation,

[1] Some cases go so far as to hold that from the moment the signal of the intending passenger has been recognized by the driver the carrier becomes liable as such. See Carr v. Milwaukee L., H. & P. Co., 132 Wis. 662, 113 N. W. 62 (1907); and Brien v. Bennett, 8 Car. & P. (Eng.) 724 (1839).

But most cases hold that although liable for not stopping when signaled, the street car companies do not accept persons as passengers while in the street. See Donavan v. Hartford St. Ry. Co., 65 Conn. 201, 32 Atl. 350 (1894), and Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341 (1906).

[2] Jackson Electric Ry., L. & P. Co. v. Lowry, 79 Miss. 431, 30 So. 634 (1901). *Accord.*, Christian v. Augusta & A. Ry. Co., (S. C.) 69 S. E. 17 (1910).

A railroad having a flag station with a station agent may insist that the station agent shall set the signal. St. Louis & S. F. Ry. Co. v. Garner (Miss.), 51 So. 273 (1910).

A person signaling a train to stop between stations is not entitled to protection. Georgia Pac. Ry. Co. v. Robinson, 68 Miss. 643, 10 So. 60 (1891).

[3] Southern Ry. Co. v. Lanning, 83 Miss. 161, 33 So. 970 (1903).

gas or electricity, may require the applicant to make a regular application in such form as the company may prescribe.[1] This will be required to be in writing almost invariably so as to have certainty as to the requirements; and the application must be made with sufficient particularity.[2] But like other conditions, this may be found to have been waived in particular cases. Thus in one of the leading cases it was held that in an action for damages for refusal to supply the plaintiff with gas, the company could not set up as a defense the fact that such application was not in writing, when its superintendent had, by agreeing that the plaintiff should have gas after he had signed the rules and regulations, waived the regulation that the application should be in writing.[3] The company cannot require the applicant to subscribe to unreasonable regulations, such as that there shall be access to these premises at all hours,[4] nor to illegal stipulations such as that the company shall not be liable for defects in the service.[5] Indeed it is doubtful whether they can require the applicant to enter into a real contract at all, the applicant having the inherent right to the service irrespective of contract.[6]

**§ 412. Use of telegraph blanks.**

It is not enough to tender a message to a telegraph

[1] *California.*—Price v. Riverside L. & I. Co., 56 Cal. 431 (1880).

*Kansas.*—Shiras v. Ewing, 48 Kans. 170, 29 Pac. 320 (1892).

*Louisiana.*—State v. New Orleans Gaslight Co., 108 La. 67, 32 So. 179 (1902).

*Tennessee.*—Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897).

[2] Bennett v. East Chester Gaslight Co., 54 N. Y. App. Div. 74, 66 N. Y. Supp. 292 (1900); Andrews v. North River Electric Co., 53 N. Y. Supp. 810, 24 N. Y. Misc. Rep. 671 (1898).

[3] Shephard v. Milwaukee Gaslight Co., 11 Wis. 234 (1860).

[4] Shepard v. Milwaukee Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479 (1858).

[5] Dittmar v. City of New Braunfels, 20 Tex. Civ. App. 293, 48 S. W. 1114 (1899).

[6] San Diego L. & T. Co. v. Sharp, 97 Fed. 394, 38 C. C. A. 220 (1899).

company with the request for its transmission, although of course one must show this at least.[1] One will be met by the usual requirement by telegraph companies that all messages tendered to them for transmission shall be in writing upon their own blanks provided for the purpose.[2] It is generally agreed that the companies may make the use of this blank a condition precedent,[3] provided, that they make this requirement generally known.[4] On the other hand, it is plain, upon general principles, that the company may waive the requirement.[5] Thus, if the message is received by the operator on an ordinary piece of paper from a person not knowing of this rule, and the charges for transmission are paid, the company will be responsible for duly transmitting it;[6] but it may

[1] *Georgia.*—Planters' Cotton Oil Co. v. Western Union Teleg. Co., 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180 (1906).

*Mississippi.*—Western Union Tel. Co. v. Dozier, 67 Miss. 288, 7 So. 325 (1889); Western Union Telegraph Co. v. Liddell, 68 Miss. 1, 8 So. 510 (1890).

[2] This is discussed in:—

*Georgia.*—Western Union Telegraph Co. v. Waxelbaum Co., 113 Ga. 1017, 39 S. E. 443, 56 L. R. A. 741 (1901).

*Maryland.*—United States Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519 (1868).

[3] *United States.*—Primrose v. Western Union Telegraph Co., 154 U. S. 1, 38 L. ed. 883, 14 S. Ct. 1098 (1893).

*Alabama.*—Western Union Telegraph Co. v. Wilson, 93 Ala. 32, 9 So. 414, 30 Am. Rep. 23 (1891).

*Mississippi.*—Western Union Telegraph Co. v. Dozier, 67 Miss. 288, 7 So. 325 (1889); Cumberland Telephone & Telegraph Co. v. Sanders, 83 Miss. 357, 35 So. 653 (1904).

[4] *Michigan.*—Carland v. Western Union Telegraph Co., 118 Mich. 369, 76 N. W. 762, 14 L. R. A. 280, 74 Am. St. Rep. 394 (1898).

*Texas.*—Western Union Telegraph Co. v. Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109 (1893).

[5] The company cannot insist upon subscription to an improper clause:—

*Georgia.*—Mathis v. Western Union Telegraph Co., 94 Ga. 338, 21 S. E. 564, 47 Am. St. Rep. 167 (1894).

*South Dakota.*—Kirby v. Western Union Telegraph Co., 4 So. Dak. 105, 55 N. W. 759, 30 L. R. A. 612, 46 Am. St. Rep. 765 (1893).

[6] *United States.*—Beasley v. Western Union Telegraph Co., 39 Fed. 181 (1889).

*Alabama.*—Harris v. Western Union Telegraph Co., 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70 (1889).

be otherwise if the sender knows of the regulations upon the regular blanks, some cases holding him subject to the usual stipulations although his message is upon plain paper.[1] Particularly difficult to deal with are questions which arise when the message is given to the operator orally. If the sender authorizes the agent to reduce the message to writing and sign it, or if he understood that the agent would do so and then transmit it, the agent is the agent of the sender for the purpose of writing and signing the message,[2] but if the agent accepts the oral message and agrees to transmit it without requiring that it shall be reduced to writing, the agent is defendant's agent.[3] Very recently this law has been subject to severe test by the custom of telephoning messages to telegraph offices. And although it is still held that the company may theoretically insist upon written messages,[4] still if it is receiving telephoned messages in the regular course of its business this condition will be held to be waived.[5]

*Mississippi.*—Western Union Telegraph Co. v. Jones, 69 Miss. 658, 13 So. 471, 30 Am. St. Rep. 579 (1892).

*New York.*—Pearsall v. Western Union Telegraph Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662 (1891).

*Texas.*—Anderson v. Western Union Telegraph Co., 84 Tex. 17, 19 S. W. 285 (1892); Western Union Telegraph Co. v. Broesche, 72 Tex. 654, 10 S. W. 734 (1889); Western Union Telegraph Co. v. Arwine, 3 Tex. Civ. App. 156, 22 S. W. 105 (1893); Western Union Telegraph Co. v. Hinkle, 3 Tex. Civ. App. 518, 22 S. W. 1004 (1893).

[1] *Alabama.*—Western Union Telegraph Co. v. Henderson, 89 Ala. 510, 7 So. 419 (1889).

*Indiana.*—Western Union Telegraph Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744 (1871).

[2] Compare Western Union Telegraph Co. v. Foster, 64 Tex. 220, 53 Am. Rep. 754 (1885), with Gulf, C. & S. F. Ry. Co. v. Geer, 5 Tex. Civ. App. 349, 24 S. W. 86 (1893).

[3] See Western Union Telegraph Co. v. Sanders (Ind.), 79 N. E. 406 (1906), and Western Union Telegraph Co. v. Dozier, 67 Miss. 288, 7 So. 325 (1889).

[4] *United States.*—Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 522, 72 C. C. A. 580, 4 L. R. A. (N. S.) 181 (1905).

*Illinois.*—People v. Western Union Tel. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637 (1897).

[5] *Indiana.*—Western Union Tele-

*Topic D. Service Must Be Demanded in Proper Manner*

**§ 413. Goods must be tendered properly packed.**

That a carrier may refuse to receive goods for carriage unless they are properly packed, is clear enough.[1] Indeed he must so refuse or take the risk from the improper packing.[2] Thus an express company need not receive furniture not protected,[3] chickens not crated,[4] jugs not boxed [5] or money not sealed.[6] But the requirements of the carrier as to packing must be reasonable; he cannot reject a package on this ground if it is in fact reasonably safe for shipment.[7] These principles come into play when one carrier tenders goods in bad condition to another carrier for further transportation. The carrier to whom such goods are tendered may refuse them alto-

graph Co. v. Todd, 22 Ind. App. 701, 54 N. E. 446 (1899).

*Michigan.*—Carland v. Western Union Telegraph Co., 118 Mich. 369, 76 N. W. 762, 14 L. R. A. 280, 74 Am. St. Rep. 394 (1898).

*Pennsylvania.*—Western Union Telegraph Co. v. Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687 (1889).

*Texas.*—Texas Telegraph & Telephone Co. v. Seiders, 9 Tex. Civ. App. 431, 29 S. W. 258 (1895).

[1] *Alabama.*—Atlantic C. L. Ry. Co. v. Rice (Ala.), 52 So. 918 (1910).

*Missouri.*—Knight v. Quincy, D. & K. C. R. R. Co., 120 Mo. App. 311 (1906).

[2] *United States.*—The David & C., 5 Blatch. 266 (1865).

*Alabama.*—Atlantic C. L. Ry. Co. v. Rice (Ala.), 52 So. 918 (1910).

*Illinois.*—Elgin, J. & E. Ry. Co. v. Bates Machine Co., 200 Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218 (1903).

*England.*—Munster v. South Eastern Ry. Co., 4 C. B. (N. S.) 676, 27 L. J. C. P. 308 (1858).

[3] Union Express Co. v. Graham, 26 Ohio St. 595 (1875).

[4] Cohn v. Platt, 48 N. Y. Misc. 378, 95 N. Y. Supp. 535 (1906).

[5] Vicksburg L. & T. Co. v. United States Exp. Co., 68 Miss. 149, 8 So. 332 (1890).

[6] Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341 (1865). See also St. John v. Express Co., 1 Woods, 612 (1871).

[7] Bluthenthal v. Southern Ry. Co., 84 Fed. 920 (1898). See generally, Duncan v. Great Northern Ry. Co. (No. Dak.), 118 N. W. 826 (1908).

gether [1] or may demand an indemnity from the tendering carrier before accepting them.[2]

**§ 414. Freight loaded by shipper.**

The same thing is true where freight is improperly loaded on a car by the shipper. In general the loading and unloading of goods are under the carrier's control and he is responsible for any injury incident thereto. Primarily, it should be noted, it is the carrier's business to load his vehicles. A railroad cannot usually require a shipper to put his goods upon the cars himself.[3] If the shipper assumes the responsibility of loading and unloading the carrier is thereby relieved from liability for loss in that connection.[4] But if the improper loading was apparent to the carrier's servant from ordinary observation the carrier will be liable.[5] The carrier must decline

[1] Buston v. Pennsylvania Ry. Co., 116 Fed. 235 (1902).

[2] Missouri Pacific Ry. Co. v. Weisman, 2 Tex. Civ. App. 86, 21 S. W. 426 (1893).

[3] London & L. F. Ins. Co. v. Rome, W. & O. Ry. Co., 144 N. Y. 200, 39 N. E. 79 (1894).

However to get car load rates the shipper must usually load the car himself; and so where a car packed for through shipment is condemned in transit the connecting carrier may refuse to take the shipment. Central of Ga. Ry. Co. v. Cook & L., 4 Ga. App. 698 (1908).

[4] *Alabama.*—McCarthy v. Louisville & N. R. R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29 (1893).

*Illinois.*—Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215 (1897).

*Massachusetts.*—Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507 (1876).

*New York.*—Jackson Architectural Works v. Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432 (1899).

*Texas.*—Gulf, W. T. & P. Ry. Co. v. Wittnebert, 101 Tex. 368, 108 S. W. 150, 130 Am. St. Rep. 858 (1908).

*Vermont.*—Ross v. Troy & B. R. R. Co., 49 Vt. 364, 24 Am. Rep. 144 (1877).

*Wisconsin.*—Miltimore v. Chicago & N. W. R. R. Co., 37 Wis. 190 (1875).

*England.*—Richardson v. North Eastern Ry. Co., L. R. 7 C. P. 75 (1872).

[5] *Illinois.*—Elgin, J. & E. Ry. Co. v. Bates Machine Co., 200 Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218 (1903).

*Minnesota.*—Calender v. Vander-

to accept it or else he will be responsible for its safety if he takes it without properly protecting it.[1]

**§ 415. Special freight may require special tender.**

Although in general, freight of all kinds may be forwarded from the regular freight stations, still there are special kinds of freight that require special handling. A lucid exposition of this exception may be found in Harp v. Choctaw, Oklahoma & Gulf Railroad,[2] these reasons being given by Thayer, Circuit Judge: "It is manifest, we think (indeed, so manifest that we might almost take judicial notice of the fact), that no railroad constructed through extensive coal fields and engaged in transporting coal to market could for any considerable period follow the practice of setting out cars on its station side tracks, some distance from the place where coal is mined, and permitting coal to be hauled thence by wagons and loaded

hoof Co., 99 Minn. 295, 109 N. W. 402 (1905).

*New York.*—Ames v. Fargo, 114 N. Y. App. Div. 666, 99 N. Y. Supp. 994 (1906).

*North Dakota.*—Duncan v. Gt. Northern R. R. Co. (N. D.), 118 N. W. 826 (1908).

*Ohio.*—Union Express Co. v. Graham, 26 Ohio St. 595 (1895).

*Texas.*—International & Gt. No. Ry. Co. v. Dwight & Co. (Tex. Civ. App.), 100 S. W. 1011 (1907).

[1] *United States.*—Hannibal R. R. Co. v. Swift, 12 Wall. 262, 20 L. ed. 423 (1870).

*Alabama.*—Atlantic C. L. Ry. Co. v. Rice (Ala.), 52 So. 918 (1910).

*Oregon.*—Goodman v. Oregon Ry. & Nav. Co., 22 Oreg. 14, 28 Pac. 894 (1892).

*Wisconsin.*—Miltimore v. Chicago & N. W. R. R. Co., 37 Wis. 190 (1875).

Where shipper loads a car properly upon a station track according to directions the railroad must take the car. Currie v. Railroad Co., 135 N. C. 535, 47 S. E. 654 (1904).

Where shipper loads goods in a different car from the one designated he cannot require that the car shall go forward. Weisinger v. Southern Ry. Co., 129 Ky. 592, 112 S. W. 660, 33 Ky. L. Rep. 1038 (1908).

[2] 125 Fed. 445, 61 C. C. A. 405 (1903).

But note in the 318½ Tons of Coal, 14 Blatch. 453, Fed. Cas. No. 14,010 (1878), it was held that a railroad might not compel shippers to use its force of shovelers in loading coal into the buckets of its conveyor on its terminal wharf.

into the cars by the slow process of shoveling. The useless consumption of time, and the additional expense incident to the handling of the commodity in question, in large quantities, in that primitive manner, would occasion great public loss and inconvenience, to say nothing of the loss sustained by the carrier, and the serious manner in which that method of handling coal would interfere with the movement of its trains and the transaction of its other business." This decision probably goes too far. It is true that a railway may make a lower rate to those shippers of coal who furnish their own facilities for loading coal in so economical a manner as by a tipple.[1] But it would seem that the railroads must receive for transportation at reasonable rates, also, coal or any other commodity usually carried in bulk at its stations from wagons.

**§ 416. Service upon fungible basis.**

A very difficult problem of public service law must soon come up for solution now that the pipe lines have been made common carriers.[2] It is obvious that if the very same oil is to be delivered to the consignee that is accepted from the consignor, the unit of service must be very large to fill up a long section of pipe line, many thousands of gallons, as the pipe line companies are maintaining in their original schedules. But is it necessary in dealing with fungibles to insist that they shall be kept separate from the mass? In the case of the elevation of grain this mixture is the usual practice;[3] and there would

[1] Illinois & St. L. R. R. Co. v. People, 19 Ill. App. 141 (1886). And in Choctaw, O. & G. R. R. Co. v. State, 73 Ark. 373, 84 S. W. 502 (1904), it was held that preference could be given shippers from private tipples when the freight yards are so congested that ordinary shippers cannot be given room.

[2] See West Virginia Transportation Co. v. Volcanic O. & C. Co., 5 W. Va. 382 (1872).

[3] See Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902).

seem to be no reason why it should not be the same in handling oil.

**§ 417. Proper conditions imposed upon installation.**

A service company may impose regulations upon the making of connections with its system. Thus, it is obvious that a water company may make the conditions upon which its pipes shall be tapped. An applicant who wishes water cannot unearth the main and drill a hole in the pipe, but the company must be consulted as to the methods by which, and as to the persons by whom these connections shall be made. There is a case in Missouri [1] which goes so far as to say that the company may designate a certain style of hydrant, or cut-off, as the only one which shall be used. If there are others equally efficient, it may seem that this requirement is unreasonable. And there is a case in Kentucky,[2] which goes to the other extreme by saying that a water company cannot dictate as to what plumbers may be employed to tap their pipes and make connections, holding that no proper plumbers may be excluded from this work. A Louisiana case holds that it is proper to require the applicant to produce a certificate from some reputable plumber that the work has been properly done.[3] If the company insists upon doing the work it involves itself in obligations; thus a New York case holds that where a gas company insisted upon making all connections between house mains and the pipes, it was bound to a proper degree of care in performing that duty.[4]

[1] State v. Goodfellow, 1 Mo. App. 495 (1876).

[2] Franke v. Paducah Water Supply Co., 88 Ky. 467, 11 S. W. 432, 4 L. R. A. 265 (1889).

[3] State v. New Orleans Gaslight Co., 108 La. 67, 32 So. 179 (1902).

[4] Bastian v. Keystone Gas Co., 50 N. Y. Supp. 537, 27 App. Div. 584 (1898).

Written permission to make connections may be waived. Citizens' Gas & O. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 557 (1904).

**§ 418. Premises must be properly prepared.**

The obligation of a supplying company is to bring the supply to the premises of the applicant. The company must itself provide all the facilities requisite to the performance of the service it offers. But the applicant must have his premises properly equipped to receive service. It follows that the company cannot usually dictate as to the installation which the customer may have for his own utilization of the supply sold; but this is subject to the condition that nothing installed by the customer shall affect the service of the company. Thus, although a gas company cannot dictate as to the style of fixtures the occupant may install, it may insist that no governor shall be put in so near the meter as to affect its reading.[1] So although an electric company may not dictate as to the kind of lamps that the householder may use, it may refuse to supply current where the wiring is found to have defective connections, making possible fires for which claims might be made against it.[2]

**§ 419. Conditions imposed must be reasonable.**

The general principle must be taken as established beyond dispute by the authorities discussed in this chapter that:[3] "In the absence of statutory interposition and regulation, the carrier is entitled to establish and promulgate reasonable rules and regulations governing the manner and form in which it will receive such articles of commerce as it is bound to carry, as well as the manner in which they shall be packed and prepared for shipment,

[1] Blondell v. Consolidated Gas Co., 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187 (1899).

[2] Benson v. American Illuminating Co., 102 N. Y. Supp. 206 (1907).

[3] What follows in this sentence is a substantial quotation from United States ex rel. v. Oregon Ry. & Nav. Co., 159 Fed. 975 (1908).

See also the language in Platt v. Lecocq, 158 Fed. 723, 730, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558 (1907).

so that they may be handled with convenience, safety and dispatch; and it follows as a corollary to such authority that the carrier has also the power to alter or modify such rules from time to time, as it may deem proper and expedient, upon reasonable notice to the public, so that interested parties may be apprised of what is required when seeking service at the hands of such carrier."[1]

**§ 420. Improper conditions cannot be imposed.**

On the other hand improper conditions may not be imposed even by regulation. In one of the leading cases to this effect the Federal court[2] said: "A common carrier is under an obligation to accept, within reasonable limits, ordinary goods which may be tendered to him for carriage at reasonable times, for which he has accommodation. The carrier cannot generally discriminate between persons who tender freight, and exclude a particular class of customers. The railroad company could not establish the rule that it would receive coal only from certain barge owners, or from a particular class of barge captains. It carries for all people indifferently. But, while admitting this duty, the company has declared that for the convenience of the public, and in order to transport coal more expeditiously, and to avoid delays, it will receive such coal only, from barges at its wharf, as shall be delivered through the agency of laborers selected by the company. This rule is a restriction upon its common law obligation. The carrier, on its part, is bound to receive goods from all persons alike. The duty and the labor of delivery to the carrier is imposed upon the barge owner, who pays for the necessary labor. The

[1] Robinson v. Baltimore & O. R. R. Co., 64 C. C. A. 281, 129 Fed. 753 (1904), is relied upon.

See also the language in Harp v. Choctaw, O. & G. R. R. Co., 61 C. C. A. 405, 125 Fed. 445 (1903).

[2] 318½ Tons of Coal, 14 Blatch. 453, Fed. Cas. No. 14,014 (1878).

service, so far as the shoveling is concerned, is performed, not upon the property of the railroad company, but upon the deck of the vessel. The company is virtually saying to the barge owner, you shall employ upon your own property, in the service which you are bound to tender, and for which you must pay, only the laborers whom we designate, and, though our general duty is to receive all ordinary goods delivered at reasonable times, we will receive only those goods which may be handled by persons of our selection. The law relating to carriers has not yet permitted them to impose such limitation upon the reception or acceptance of goods." [1]

[1] See also Crouch v. L. & N. W. Ry. Co., 14 C. B. 255 (1859); and Beadell v. Eastern Counties Ry. Co., 2 C. B. (N. S.) 509 (1854).

# CHAPTER XIII

## PREPAYMENT AS A CONDITION

§ 430. Payment as a condition.

*Topic A. Prepayment May Be Required*

§ 431. Prepayment made a condition.
432. Compensation due upon acceptance.
433. Service partially completed before demand.
434. Deposit required when charges are undetermined.
435. Whether different treatment constitutes discrimination.
436. Security required for reply telegram.
437. Security for additional charges.

*Topic B. Sufficiency of Tender*

§ 438. What is proper tender.
439. Denomination of money tendered.
440. Reasonable time to produce payment.
441. Tender must be in proper currency.
442. Waiver of prepayment.
443. Conduct dispensing with tender.

*Topic C. The Unit of Service*

§ 444. Public service upon a unit basis.
445. Company cannot insist upon more than one unit.
446. The journey as a single unit.
447. Forfeiture of right to original journey.
448. Effect of outright repudiation.
449. Present unit distinguished from past unit.

*Topic D. Payment of Arrearages Demanded*

§ 450. Payment for previous carriage not required.
451. Payment of arrearages not generally required.
452. Cases requiring payment of arrearages.
453. Applicant in default at other premises.
454. Payment of collateral claims cannot be demanded.
455. Cannot urge another's default.
456. No requirement to pay arrears of predecessors.
457. Assumption of predecessor's arrears.
458. Cannot shut off service for disputed arrearages.
459. Character of the dispute.
460. Waiver of right to refuse.

**§ 430. Payment as a condition.**

Although one who engages himself in public employment is bound to serve all who apply, it is necessarily upon the condition that he may demand in advance his reasonable charge for the service required. This was often remarked in the early cases; in one, Hussey, C. J., said that "a victualler shall be compelled to sell his victual if the vendee has tendered him ready payment, otherwise not. Quod Brian, C. J., affirmavit." [1] This principle is so obvious that it hardly ever is brought in question in modern cases. But the court thought it necessary to remind counsel in one case [2] that even the declaration of Constitution, that railways within the State are public highways, does not authorize one to ride on a train without payment of fare. A service is certainly public although compensation is required.[3] "All have rights; each pays in proportion to his use; and some are excluded because of their inability to pay; nevertheless it remains a public use so long as all persons have the same measure of right for the same measure of money." It may be added that the fact that a company has given a supply gratuitously in the past does not oblige the company to continue to do so.[4]

*Topic A. Prepayment May Be Required*

**§ 431. Prepayment made a condition.**

Of the right to demand payment before undertaking the service requested, there can be no doubt. The carrier of goods may in all cases insist upon the payment of his charges when the goods are tendered to him.[5] Even

[1] Y. B. 10 H. VII, 8, pl. 14 (1494). See also Y. B. 39 H. VI, 18, pl. 24, per Danby, J.

[2] Farber v. Missouri Pacific Ry. Co., 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350 (1893).

[3] The quotation which follows is from Evergreen Cemetery Association v. Beecher, 53 Conn. 551, 5 Atl. 353 (1885).

[4] Borough of Carlisle v. Carlisle G. & Water Co. (Pa.), 4 Atl. 179 (1886).

[5] *Illinois.*—Galena, etc., R. Co. v. Rae, 18 Ill. 488, 68 Am. Rep. 574

if he is a connecting carrier to whom the goods are brought by the initial carrier with the idea that the consignee shall ultimately pay, he may insist.[1] So the carrier of passengers may make it a condition of accepting a passenger for carriage that the fare be paid in advance,[2] or that a ticket shall be purchased and presented.[3] Similarly an

(1857); Illinois Central R. Co. v. Frankenburg, 54 Ill. 88, 5 Am. Rep. 92 (1870).

*Michigan.*—Fitch v. Newberry, 1 Doug. 1, 40 Am. Dec. 33 (1843).

*North Carolina.*—Randall v. Richmond & D. R. Co., 108 N. C. 612, 13 S. E. 137 (1891).

*Pennsylvania.*—Shipper v. Pennsylvania R. R. Co., 47 Pa. St. 338 (1864).

*Vermont.*—Wilder v. St. Johnsbury & L. C. R. Co., 66 Vt. 636, 30 Atl. 41 (1894).

*England.*—Wyld v. Pickford, 8 M. & W. 443 (1841); ——— v. Jackson, Peake's Add. Cas., 185 (1800).

[1] *United States.*—Little Rock & M. R. R. Co. v. St. Louis, I. M. & So. Ry. Co., 59 Fed. 400 (1894); Southern Ind. Exp. Co. v. United States Exp. Co., 92 Fed. 1022, 35 C. C. A. 172 (1899).

*Missouri.*—Pearce v. Wabash R. R., 89 Mo. App. 437 (1901).

*North Carolina.*—Randall v. Richmond & D. R. Co., 108 N. C. 612 (1891).

*Texas.*—Missouri Pac. R. Co. v. Weisman, 2 Tex. Civ. App. 86, 21 S. W. 426 (1893).

[2] *United States.*—Boylan v. Hot Springs R. Co., 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. 50 (1889).

*California.*—Tarbell v. Central Pac. R. R., 34 Cal. 616 (1868); Nye v. Marysville & Y. C. S. R. R., 97 Cal. 461, 32 Pac. 530 (1893).

*Illinois.*—Illinois Cent. R. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138 (1867).

*Kansas.*—South Kansas Ry. v. Hinsdale, 38 Kans. 507, 16 Pac. 937 (1888).

*New York.*—Elder v. International Ry. Co., 122 N. Y. Supp. 880 (1910).

[3] *Illinois.*—Illinois Cent. R. Co. v. Loutham, 80 Ill. App. 579 (1898).

*Indiana.*—Pittsburgh, C. & St. L. R. N. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68 (1877).

*Maryland.*—Northern Central Ry. Co. v. O'Connor, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 442 (1892).

*Michigan.*—Van Dusan v. Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354 (1893).

*Minnesota.*—Dickerman v. St. Paul Union Depot Co., 44 Minn. 433, 46 N. W. 907 (1890).

*Nebraska.*—Burlington & M. R. R. R. v. Rose, 11 Neb. 177, 8 N. W. 433 (1881).

*New York.*—Corwin v. Long Island R. R. Co., 2 N. Y. City Ct. 106 (1885).

*Ohio.*—Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 457 (1860).

innkeeper has a right, if he chooses, to demand payment of his charges in advance before he receives the guest.[1] By the same principles, a telephone user must pay in advance the usual charge made for the regular period of filling prevailing [2] and a patron at a pay station must pay the charge for the connection as required. So tender of charges must accompany a demand for water service, especially where the tap service is asked which can be computed in advance.[3] Without going into more details at present, the general rule may be repeated that in all cases the service company may refuse to act until payment is forthcoming.

**§ 432. Compensation due upon acceptance.**

Should the service be undertaken without demand for payment, the whole compensation nevertheless is due immediately. Thus one who is accepted as a guest at an inn then subjects himself to the presentment of a bill from that moment.[4] It is upon this general principle

*Texas.*—International, etc., R. Co. v. Goldstein, 2 Tex. App. Civ. Cas. 274 (1884).

*Vermont.*—Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337 (1858).

[1] *England.*—Fell v. Knight, 8 M. & W. 269, 10 L. J. Ex. 277, 5 Jur. 554 (1841); Mulliner v. Florence, 3 Q. B. D. 484, 47 L. J. Q. B. 700, 38 L. T. 167, 26 W. R. 385 (1878).

[2] *Louisiana.*—Malochee v. Gt. Southern Telephone & T. Co., 49 La. Ann. 1690, 22 So. 922 (1897).

*Montana.*—Ashley v. Rocky Mountain Bell Telephone Co., 25 Mont. 286, 64 Pac. 765 (1901).

*Nebraska.*—Buffalo County Telephone Co. v. Turner, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693 (1908).

[3] *Alabama.*—Hieronymus Bros. v. Bienville Water Supply Co., 131 Ala. 447, 31 So. 31 (1901).

*Maine.*—Robbins v. Bangor R. & E. Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963 (1905).

*New York.*—People v. N. Y. Suburban Water Co., 56 N. Y. Supp. 364, 38 App. Div. 413 (1899).

*Tennessee.*—Harbison v. Knoxville Water Co. (Tenn. Chan. App.), 53 S. W. 993 (1899).

[4] *New York.*—Smith v. Keys, 2 Thomp. & C. 650 (1874).

*England.*—Medawar v. Grand Hotel, 2 Q. B. 11, 60 L. J. Q. B. 209, 64 L. T. (N. S.) 851, 55 J. P. 614 (1891).

*Canada.*—Doyle v. Walker, 26 Up. Can. Q. B. 502 (1867).

that a conductor who at first collects too little from his passenger may return upon discovering it, and demand the immediate payment of the balance.[1] But it has been held that where a conductor with full knowledge of the facts has once accepted what is given by the passenger as full satisfaction, he cannot later eject him for his refusal to pay more.[2] That the payment is due from the beginning of the service is further shown by those cases which hold it proper to charge those who do not pay promptly an additional amount, even when bills are rendered in advance of the performance of the service.[3]

**§ 433. Service partially completed before demand.**

It not infrequently happens that a person has received part of his service before the price is demanded and he is sometimes dishonest enough to attempt to get the remainder of the service upon payment for the remainder. That this attempt is illegal should be plain. A passenger who refuses to pay the whole fare may thereupon be ejected, although he is willing to pay fare from the intermediate point at which it is discovered that he has not paid.[4] Upon this general principle here involved, a serv-

[1] *Georgia.*—Coyle v. Southern Ry. Co., 112 Ga. 121, 37 S. E. 163 (1900).

*Iowa.*—Hoffman v. Denver & N. W. R. R. Co., 52 Iowa, 342 (1879).

*Minnesota.*—Wardwell v. Chicago, M. & St. P. Ry. Co., 46 Minn. 514, 49 N. W. 206, 24 Am. St. Rep. 246 (1891).

*New York.*—Elder v. International Ry. Co., 122 N. Y. Supp. 880 (1910).

[2] Louisville, H. & St. L. Ry. v. Joplin, 21 Ky. Law Rep. 1380, 55 S. W. 206 (1900).

[3] *Alabama.*—Hieronymus v. Bienville Water Co., 131 Ala. 447, 31 So. 31 (1901).

*Washington.*—Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35 (1891).

*Canada.*—Attorney General of Canada v. City of Toronto, 23 Can. Sup. 514 (1892).

[4] *Alabama.*—Manning v. Louisville & N. R. R., 95 Ala. 392, 11 So. 8, 16 L. R. A. 55, 36 Am. St. Rep. 225 (1891).

*Arkansas.*—Kansas City Ry. v. Holden, 66 Ark. 602, 53 S. W. 45 (1899).

*Georgia.*—Coyle v. Southern Ry. Co., 112 Ga. 121, 37 S. E. 163 (1900).

ice company which has not been paid on the first day of the quarterly period may insist upon payment for the whole period whenever its collector comes for it.[1] It is different in the case of goods which have been accepted without demand for payment. The cases hold that if transportation is undertaken without demanding prepayment, payment may not be required again until the time comes for delivery.[2] This is because the acceptance of the goods upon the basis that charges are to be paid by the consignee evidences a contract to that effect. This seems to be the law in the analogous case of a telegraph message at first received on the basis that the charges are to be collected from the addressee.[3]

**§ 434. Deposit required when charges are undetermined.**

In respect to many services it will be seen that the rule in its simple form that payment for the service asked must be made in advance is not workable, for it cannot be known in advance how much service will be taken. This is particularly true of measured service whether gas, water, electricity or telephone,—to name four prominent instances of this situation. The happy solution of this problem has been to permit these companies to demand a reasonable deposit in advance to cover expected supply.

*New Jersey.*—Jersey City R. R. Co. v. Morgan, 52 N. J. L. 60, 18 Atl. 904 (1889).

[1] *Alabama.*—Hieronymus v. Bienville Water Co., 131 Ala. 447, 31 So. 31 (1901).

*Pennsylvania.*—Tyrone Gas & Water Co. v. Burley, 19 Pa. Super. Ct. 348 (1902).

[2] *Indiana.*—Grand Rapids & I. R. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. Rep. 385 (1894).

*Missouri.*—Davis v. Kansas City, S. J. & C. B. R. R., 53 Mo. 317, 14 Am. Rep. 457 (1873).

*New York.*—Leach v. New York, N. H. & H. R. R. Co., 89 Hun, 377, 35 N. Y. Supp. 305 (1895).

*England.*—Barnes v. Marshall, 18 Q. B. 785 (1852).

[3] *Alabama.*—Western Union Telegraph Co. v. Cunningham, 99 Ala. 314, 14 So. 579 (1892).

*Texas.*—Western Union Telegraph Co. v. Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851 (1901).

As to what a reasonable amount is, there are but few decisions.[1] A small minimum deposit is always reasonable—$5.00 is usual. But larger sums may be demanded when the circumstances warrant it. Thus it was held in the leading case [2] that a hotel which used about $60.00 worth of gas a week might be required to deposit $100. The court thought that the company might either require a personal guaranty or an actual deposit. In either case the condition was said to be a reasonable one. The facts in this case give the clue to the basis upon which reasonableness is predicated; for it seems clear that the amount of deposit which may be required is what would ordinarily be sufficient to cover the expected use in the usual period for which bills are rendered.

### § 435. Whether different treatment constitutes discrimination.

It is apparently established beyond question as to common carriers that, as no one has a right to have service without prepayment, there can be no complaint made if some are given service without requiring prepayment of them, while others are obliged to pay in advance.[3] The

[1] Williams v. Mutual Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266 (1884).

[2] In the following cases the propriety of requiring a deposit was recognized:

*Idaho.*—Bardsly v. Boise Irr. & Land Co., 8 Idaho, 155, 67 Pac. 428 (1901).

*Kentucky.*—Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351 (1897).

*Massachusetts.*—Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432 (1898).

*Missouri.*—Vanderberg v. Kansas City Missouri Gas Co., 126 Mo. App. 600 (1907).

*New York.*—Ford v. Brooklyn Gaslight Co., 3 Hun, 621 (1875); Bennett v. Eastchester Gaslight Co., 54 N. Y. App. Div. 74, 66 N. Y. Supp. 292 (1900); Pollits v. Consolidated Gas Co., 102 N. Y. Supp. 1017 (1907).

*Wisconsin.*—Shepard v. Milwaukee Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479 (1858).

[3] Randall v. Railroad, 108 N. C. 612, 13 S. E. 137 (1891); Brown & B. Coal Co v. Grand Trunk Ry.

cases go so far as to hold a carrier not liable for demanding prepayment of freight for goods addressed to certain consignees while accepting goods addressed to other consignees without prepayment.[1] And this law will apparently hold good as to the other public services, notwithstanding certain recent cases which are still difficult to reconcile with it. In an Arkansas case [2] it was held lately that requiring one subscriber to come to the central office and prepay toll charges while customarily giving credit by monthly bills to other subscribers, was illegal. This may be so, because he, as a subscriber, was not furnished residence service of the same sort that other subscribers enjoyed. Again, in a late Kentucky case [3] the court was indignant because certain lighting companies were requir-

Co., 159 Mich. 565, 124 N. W. 528 (1910).

Consequently a carrier may take goods from one connecting carrier with which it is closely allied, not only not demanding its charges in advance, but also advancing to the preceding carrier the accrued charges while refusing both favors to a rival connection. Little Rock & M. R. R. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed. 400 (1894); Little Rock & M. R. R. Co. v. St. Louis S. W. Ry. Co., 63 Fed. 775, 11 C. C. A. 417 (1894); Southern Indiana Exp. Co. v. United States Exp. Co., 92 Fed. 1022, 35 C. C. A. 172 (1899); Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142 (1898).

[1] Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 168 Fed. 161, 94 C. C. A. 217 (1909).

There may be prepay stations at which the carrier delivers freight to the consignee directly, and without the intervention of a local agent, and to which consequently consignments are accepted only upon the condition of charges for transportation being prepaid by the shipper. Bird v. Railroads, 99 Tenn. 719, 63 Am. St. Rep. 856 (1897).

[2] Yancey v. Batesville Telephone Co., 81 Ark. 487, 99 S. W. 679 (1907). See also State v. Kinloch Telephone Co., 93 Mo. App. 349, 67 S. W. 684 (1902).

[3] Owensboro Gaslight Co. v. Hildebrand, 19 Ky. L. Rep. 983, 42 S. W. 351 (1897); Long v. Springfield Water Co., 8 Del. Co. (Pa.) 151 (1901).

But by some cases the companies are allowed discretion in deciding whether it is necessary to require deposit. Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432 (1898); Phelan v. Boone Gas Co. (Iowa), 125 N. W. 208 (1910).

ing a deposit of some of their customers but not of others. This may again be correct, because the requirement of a deposit obliging the customer to pay for services he is to receive in the future would be beyond the rights of the service company, were it not brought about by a reasonable regulation; and to be reasonable it is usually held that a regulation must be uniform.

**§ 436. Security required for reply telegram.**

A striking illustration of this right to demand a deposit to cover services which will probably be required is to be seen in the matter of reply telegraph service. Of course the telegraph company may require prepayment for a message. But is it a reasonable regulation that persons sending messages which ask for answers must deposit the regular amount chargeable for a reply message? [1] In supporting this requirement the leading case [2] said: "We are unable to perceive anything unreasonable in the by-law under examination. A person who sends another a message, and asks an answer, promises by fair and just implication to pay for transmitting the answer. It is fairly inferable that the sender who asks an answer to his message will not impose upon the person from whom he requests the answer the burden of paying the expense of its transmission. The telegraph company has a right to proceed upon this natural inference and to take reasonable measures for securing legal compensation for its services. It is not unnatural, unreasonable or oppressive for the telegraph company to take fair measures to secure payment for services rendered, and in requiring a transient

[1] Langley v. Western Union Telegraph Co., 88 Ga. 777, 15 S. E. 291 (1892). See further Western Union Telegraph Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109 (1889).

[2] Western Union Telegraph Co. v. McGuire, 104 Ind. 130, 2 N. E. 201, 54 Am. Rep. 296 (1885). See further Hewlett v. Western Union Telegraph Co., 28 Fed. 181 (1886).

person to deposit the amount legally chargeable for an ordinary message, it does no more than take reasonable measures for securing compensation for transmitting the asked and expected message."

**§ 437. Security for additional charges.**

This particular problem of charges comes up in another form as to the transmission of telegrams. As the usual charge only includes the delivery of a telegram within the established free delivery limits at the point of destination, it is proper for the company to make additional charges for delivery outside these limits. If it is known to the parties at the time of transmission that the addressee lives outside these limits, it is reasonable to require an additional amount.[1] But a regulation of a company requiring the sender of a telegram to pay in advance charges for the delivery of the message in case the addressee lives beyond its free-delivery limits, irrespective of whether the distance of the addressee's residence from the station is known, is held to go beyond what is reasonable.[2]

*Topic B. Sufficiency of Tender*

**§ 438. What is proper tender.**

Much of the usual law of tender holds good in this matter. Thus a mere willingness on the part of a passenger to pay the fare, unaccompanied by a tender or act calculated to suggest such willingness to the conductor, is not sufficient to place the conductor in the wrong in

[1] *Kentucky.*—Western Union Telegraph Co. v. Mathews, 107 Ky. 663, 55 S. W. 427 (1900).

*Texas.*—Western Union Telegraph Co. v. Warren (Tex.), 36 S. W. 314 (1896).

[2] *Alabama.*—Western Union Telegraph Co. v. Henderson, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148 (1889).

*Texas.*—Anderson v. Western Union Telegraph Co., 84 Tex. 17, 19 S. W. 285 (1892); Western Union Telegraph Co. v. Ayers (Tex.), 93 S. W. 199 (1906).

ejecting the passenger.[1] Moreover, this tender must be kept good in order to keep the company in default, as was held in the case of an applicant for water service who had once tendered the requisite charges.[2] So also a telephone subscriber must bring his payment to the office of the company and cannot complain that the custom of the company to send out a collector has been abandoned.[3] And a withholding of the money until change shall be given prevents it from being a proper tender.[4] Despite these analogies the payment in advance of compensation to a company is not the payment of a debt, but the satisfaction of a reasonable condition. A debtor must make legal tender of the exact amount due, but a passenger paying his fare may tender a greater amount and demand change, provided it is a reasonable demand.[5] As payment is simply the satisfaction of a condition precedent, not the performance of a contractual obligation, it makes no difference by whom the tender is made. Thus when strangers offer to pay fare for a person who is about to be ejected the conductor must desist.[6]

[1] Texas & P. Ry. Co. v. James, 82 Tex. 306, 18 S. W. 589, 15 L. R. A. 347 (1891). But a tender made protesting is good. Atchison, T. & S. F. R. Co. v. Roberts, 3 Tex. Civ. App. 370, 22 S. W. 183 (1893).

[2] Baker v. San Francisco Gas Co., 141 Cal. 710, 75 Pac. 342 (1904). Therefore a tender withdrawn goes for nothing. Western Union Telegraph Co. v. Power, 93 Ga. 543, 21 S. E. 51 (1894).

[3] Magruder v. Cumberland Telephone & T. Co., 92 Miss. 716, 46 So. 404, 16 L. R. A. (N. S.) 560 (1908).

[4] Louisville & N. R. R. Co. v. Cottengim (Ky.), 104 S. W. 280 (1907).

It would seem that readiness should be enough as payment and acceptance should be simultaneous acts. Tarbell v. Central Pacific R. R. Co., 31 Cal. 616 (1868).

[5] Of these cases cited in the next section, see particularly Barrett v. Market St. Ry. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. Rep. 61 (1889).

[6] *United States.*—Missouri K. & T. Ry. Co. v. Smith, 152 Fed. 608 (1907).

*Indiana.*—Baltimore & O. R. R. Co. v. Norris, 17 Ind. App. 189, 46 N. E. 554 (1896).

*Indian Territory.*—Missouri, K. & T. Ry. Co. v. Smith, 6 Ind. Terr. 99, 89 S. W. 668 (1905).

**§ 439. Denomination of money tendered.**

What denomination of money it will be reasonable to require a conductor to change has been considered in several cases. In several cases it has been held reasonable to tender five dollars for a five-cent street-car fare.[1] On the other hand, a tender of a five-dollar bill in a street car has been held unreasonable where a regulation of the company required the conductors to furnish change only for two-dollar bills, no custom to change larger bills being shown.[2] The reasons for such limitations are well set forth in the New York case, by Mr. Justice Bartlett: "In the case at bar the reasonableness of the rule established by the defendant is obvious. In a large city like New York the round trip of a car of any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change. When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and

*Missouri.*—Randall v. Chicago, R. I. & P. Ry. Co., 102 Mo. App. 342, 76 S. W. 493 (1903).

*New York.*—O'Brien v. New York C. & H. R. R. R. Co., 80 N. Y. 236 (1880).

*Pennsylvania.*—Ham v. Delaware & H. C. Co., 142 Pa. St. 617, 21 Atl. 101 (1891).

*Tennessee.*—Louisville & N. R. R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640 (1881).

[1] *California.*—Barrett v. Market Street Ry. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. Rep. 61 (1889).

*Tennessee.*—Knoxville Traction Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992, 9 L. R. A. (N. S.) 579 (1907).

[2] *Georgia.*—Wynn v. Georgia Ry. & El. Co., 6 Ga. App. 77, 64 S. E. 278 (1909).

*New York.*—Barker v. Central Park N. & E. R. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626 (1896).

*Pennsylvania.*—Muldowney v. Pittsburg & B. Tr. Co., 8 Pa. Super. Ct. 335, 43 W. N. C. 52 (1898).

*South Carolina.*—Funderburg v. Augusta & A. Ry. Co., 81 S. C. 141, 61 S. E. 1075, 21 L. R. A. (N. S.) 868 (1908).

burdensome to extend the amount to five dollars. It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares." Fundamentally it is all a question of the amount of change required. Thus, a tender of a twenty-five dollar bill to pay a fare of one dollar and twenty-five cents is obviously unreasonable [1] while a tender of fifteen dollars for freight charges of fourteen dollars and eighty-five cents is plainly reasonable.[2]

**§ 440. Reasonable time to produce payment.**

It seems, however, that before breaking off the negotiation for service the applicant should be given a reasonable time to produce payment.[3] Thus a passenger should be given a fair opportunity to search his pockets for a ticket or get at his money.[4] But of course one cannot ask the conductor to wait a while until he gets ready to pay and until he can decide whether he will pay or not.[5] It would

[1] Fulton v. Grand Trunk Ry., 17 Up. Can. Q. B. 428 (1859).

[2] Houston E. & W. T. Ry. v. Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225 (1898).

[3] *Connecticut.*—Maples v. New York & N. H. R. R. Co., 38 Conn. 557, 9 Am. Rep. 434 (1871).

*Illinois.*—Chicago & Alton R. R. Co. v. Willard, 31 Ill. App. 435 (1888).

*Michigan.*—Ferguson v. Michigan Cent. R. Co., 98 Mich. 533, 57 N. W. 801 (1894).

*Mississippi.*—Louisville & N. R. Co. v. Maybin, 66 Miss. 83, 5 So. 401 (1889).

*Missouri.*—Bolles v. Kansas City So. Ry. Co., 134 Mo. App. 696 (1909); Randall v. Chicago, R. I. & P. Ry. Co., 102 Mo. App. 342, 76 S. W. 493 (1903).

*North Carolina.*—Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822 (1901).

*Texas.*—International & Gt. No. R. R. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491 (1887).

[4] *Illinois.*—Chicago & A. R. R. Co. v. Willard, 31 Ill. App. 435 (1888).

*New York.*—Huba v. Schenectady Ry. Co., 85 N. Y. App. Div. 199, 83 N. Y. Supp. 157 (1903).

*North Carolina.*—Clark v. Wilmington & W. R. R. Co., 91 N. C. 506, 49 Am. Rep. 647 (1884).

*Texas.*—International & Gt. N. Ry. Co. v. Wilkes, 68 Tex. 617, 5 S. W. 491, 2 Am. St. Rep. 515 (1887).

[5] *California.*—Nye v. Marysville

seem that unusual patience ought to be used in dealing with incapable persons.[1] By the authorities one judges that it would not be safe for the conductor not to permit the passenger to seek friends upon the train.[2] And perhaps the conductor ought to accept a bill as security while the search is proceeding.[3]

**§ 441. Tender must be in proper currency.**

The company must accept legal tender [4] or whatever passes as current in the community.[5] If a tender of proper currency is made, the official refuses it at his peril. Thus, if he rejects a bill or coin as counterfeit, or a coin as too much worn and the money is found to be in fact good, the carrier is liable for the wrongful ejection, if he puts a passenger off under such circumstances.[6] But a refusal

& Y. C. R. R. Co., 97 Cal. 461, 32 Pac. 530 (1893).

*Canada.*—Fulton v. Grand Trunk Ry. Co., 17 Up. Can. Q. B. 428 (1858). See also Thomas v. Geldart, 20 New Br. (4 Pug. & B.) 95 (1880).

[1] In Louisville, N. & Gt. So. R. R. Co. v. Fleming, 14 Lea (Tenn.), 128 (1884), it was held that a conductor was under no obligation to himself search for a ticket in the pockets of an old colored man whose hands were partly paralyzed.

But in Ferguson v. Michigan Central R. R. Co., 98 Mich. 533, 57 N. W. 801 (1894), a person subject to chronic drowsiness, being ejected without sufficient efforts to arouse him, the company was held liable.

[2] *North Carolina.*—Clark v. Wilmington & W. R. R. Co., 91 N. C. 506 (1884).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Bunn, 41 Tex. Civ. App. 503 (1908)

[3] *Kentucky.*—Anderson v. Louisville & N. R. R. Co., 134 Ky. 344, 120 S. W. 298 (1909).

*North Carolina.*—Knowles v. Railroad Co., 102 N. C. 59 (1889).

[4] Lewis v. New York Central R. R. Co., 49 Barb. 330 (1867). But see Tarbell v. Central Pacific R. R. Co., 31 Cal. 616 (1868).

[5] Mobile & Ohio R. R. Co. v. Wisdom, 5 Heisk, 125 (1871). But see Louisville & N. R. R. Co. v. Garrett, 8 Lea (Tenn.), 438, 41 Am. Rep. 194 (1887).

[6] *Alabama.*—Mobile St. Ry. v. Watters, 135 Ala. 227, 33 So. 42 (1902).

*Georgia.*—Atlanta Consol. St. Ry. v. Keeny, 99 Ga. 266, 25 S. E. 629, 33 L. R. A. 824, and note (1896).

*Missouri.*—Breen v. St. Louis Tr. Co., 102 Mo. App. 479, 77 S. W. 78 (1903).

*New Jersey.*—Jersey City & B. R. R. v. Morgan, 52 N. J. L. 60, 18 Atl. 904, 52 N. J. L. 558, 21 Atl. 783 (1889).

to carry one who presents a mutilated note is justifiable, although it could be redeemed, for the applicant cannot cast upon the carrier the redemption of it.[1] And a ticket so defaced as to be in part illegible may be refused.[2] Of course the official can refuse to take the applicant's jewelry or other valuables either in payment or as security for payment.[3]

**§ 442. Waiver of prepayment.**

The necessity of tender may be and often is generally waived in practice. Thus if the inn is open and the traveler enters and makes his desire to become a guest known to the innkeeper, the latter must request a tender if he means to insist upon it as a condition of receiving a guest.[4] And generally where prepayment is commonly waived, the company must expressly demand it.[5] But in any case payment for service can never be demanded on credit as a right, no matter how common such a practice may have been.[6] Even in a case of a telephone company which for years had given patrons a month's credit by

*Wisconsin.*—Vassau v. Madison E. Ry., 106 Wis. 301, 82 N. W. 152 (1900).

A passenger who has innocently purchased a ticket with counterfeit money may be ejected. Memphis & C. R. R. Co. v. Chastine, 54 Miss. 503 (1877).

[1] North Hudson County Ry. Co. v. Anderson, 61 N. J. L. 248, 39 Atl. 905, 68 Am. St. Rep. 703 (1898).

A ticket is valid although torn if the pieces fit together into a complete ticket. Young v. Central of Georgia Ry. Co., 120 Ga. 25, 47 S. E. 556 (1904).

[2] But only if it has become thus illegible in the hands of the buyer—not if it was thus sold him by the ticket agent. Northern Central Ry. Co. v. O'Connor, 76 Md. 207, 24 Atl. 449, 35 Am. St. Rep. 442 (1892).

[3] Texas & P. Ry. Co. v. Smith (Tex.), 84 S. W. 852 (1905).

[4] Fell v. Knight, 8 M. & W. 269, 10 L. J. Ex. 277, 5 Jur. 554 (1841); Pinchon's Case, 9 Coke, 87 (1611); Rex v. Ivens, 7 Car. & P. 213 (1835).

[5] *Delaware.*—Reed & Walker v. Phil., W. & B. R. R. Co., 3 Houst. 176 (1865).

*Illinois.*—Frink v. Schroyer, 18 Ill. 416 (1857).

*Texas.*—Galveston, H. & S. A. Ry. Co. v. Schmidt (Tex. Civ. App.), 25 S. W. 452 (1894).

[6] Rome & Oswego Road Co. v. Stone, 62 Barb. 601 (1863).

the system upon which its bills were rendered, it was held that it might by a mere notice require a particular customer to pay in advance.[1] Where the waiver is plain in a particular case the undertaking has of course begun without the condition performed. Thus where a carrier accepts a passenger or goods for carriage without making demand for payment he is liable as common carrier of the passenger or goods though the fare or freight has not been paid.[2] So if a telegram is taken with the understanding that it is taken collect, the company is bound to forward it with all dispatch.[3]

**§ 443. Conduct dispensing with tender.**

Certain situations are free from difficulty. If the company has repudiated its obligation it is unnecessary to go further and make tender.[4] Nor need a tender be kept

[1] Malochee v. Gt. So. Telephone & T. Co., 49 La. Ann. 1690, 22 So. 922 (1897).

[2] *United States.*—Mellquist v. The Wasco, 53 Fed. 546 (1892).

*Illinois.*—Cleveland, C., C. & S. L. R. R. Co. v. Scott, 111 Ill. App. 234 (1903).

*Indiana.*—Grand Rapids & I. R. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. Rep. 385 (1894).

*Iowa.*—Russ v. Steamboat Eagle, 14 Iowa, 363 (1862).

*Mississippi.*—Hurt v. Southern Ry. Co., 40 Miss. 391 (1966).

*Missouri.*—Gratrot St. W. Co. v. Missouri, K. & T. Ry. Co., 124 Mo. App. 545, 102 S. W. 11 (1907).

*North Carolina.* — Porter v. Raleigh & G. R. Co., 132 N. C. 71, 43 S. E. 547 (1903).

*Texas.*—Houston & T. C. R. R. Co. v. Washington (Tex. Civ. App.), 30 S. W. 719 (1895).

[3] *Alabama.*—Western Union Telegraph Co. v. Cunningham, 99 Ala. 314, 14 So. 579 (1892).

*Indiana.*—Western Union Telegraph Co. v. Yopst, 118 Ind. 248, 3 L. R. A. 224, 20 N. E. 222 (1889).

*Texas.*—Western Union Telegraph Co. v. Snodgrass, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851 (1901).

*A fortiori* this is true when prepayment is expressly waived. Western Union Telegraph Co. v. O'Keefe (Tex. Civ. App.), 29 S. W. 1137 (1895).

Where a telegraph company receives payment for messages, but sends them collect, and damages proximately result therefrom, a recovery may be had. Hall v. Western Union Telegraph Co., 51 So. (Fla.), 819 (1910).

[4] Galveston, H. & S. A. Ry. Co. v. Schmidt (Tex. Civ. App.), 25 S. W. 452 (1894).

good after such repudiation.[1] So if excessive payment is demanded no tender need be made of what the patron believes to be a reasonable sum.[2] Even if the illegal rates have previously been submitted to, there is no obligation to pay such charges.[3] Where a supply company has fixed no rates it cannot insist upon a definite tender.[4] And where the charges to be made for a shipment cannot as yet be ascertained readiness to pay is enough.[5]

### *Topic C. The Unit of Service*

**§ 444. Public service upon a unit basis.**

One applying to a public service company for service is not altogether free to determine what service he will have, and for what amount of service he will pay. It is for the public service company itself in the first instance to decide upon what basis it will render service, and the decision of the company as to the units in which it will provide service is conclusive unless their action is unreasonable. Thus one who wishes to go a journey cannot demand the right to pay mile by mile, but the company may insist that he pay for the whole journey as a unit whenever fare is demanded. So one who wishes water for irrigation cannot demand a day's supply, but it may be insisted that he shall take for the whole season. In these two instances the unit insisted upon by the company is the natural unit of service; but there are many instances in public service where there is no natural unit, and where, therefore, the matter is left to the decision of

[1] Ashley v. Rocky Mountain Bell Telephone Co., 25 Mont. 286, 64 Pac. 765 (1901).

[2] Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 108 N. W. 1081 (1906).

[3] Cleburne Water, I. & L. Co. v. City of Cleburne, 13 Tex. Civ. App. 141, 35 S. W. 733 (1896).

[4] Bothwell v. Consumers' Company, 13 Idaho, 568, 92 Pac. 533, 24 L. R. A. (N. S.) 485 (1907).

[5] Pittsburg, C., C. & St. L. Ry. Co. v. Wood (Ind. App.), 84 N. E. 1009 (1908).

the company unless it acts outrageously. Thus it would be entirely reasonable for the company to fix three months as the unit of water service;[1] and a telephone company[2] may fix a six months' period. Considered as an existing fact the unit established is an entirety; payment of the whole unit must be tendered in order to be in a position to demand any service. This problem may well be discussed here. But whether the established unit is a reasonable one depends upon principles governing the making of rates which are more fully developed later; and discussion of this problem is therefore postponed.

**§ 445. Company cannot insist upon more than one unit.** In supplying water for irrigation, the agricultural season seems to be the natural unit of service which the company may enforce upon the applicant; but, on the other hand, the company may not require the applicant to engage to take a supply for a longer period; still less, as the company attempted in one extreme case,[3] require the applicant to pay in advance for more than one season. The demand made by the company in that case was for the applicant to pay ten dollars per acre in advance for ten years and, in addition, a dollar and a half per acre for each of ten years. The court held this altogether unreasonable: "The carrier would also, under counsel's view, be able to consummate a most unreasonable and unjust discrimination. B. could have water because he can pay for its carriage twenty years in advance; C. could not have

[1] A water company may make its unit of service three months and require all takers to pay this rate in advance. Harbison v. Knoxville Water Co. (Tenn. Ch. App.), 53 S. W. 993 (1899).

[2] A telephone company may make its unit of service six months and require all subscribers to pay this rental in advance. Buffalo County Telephone Co. v. Turner, 82 Neb. 841, 118 N. W. 1064, 19 L. R. A. (N. S.) 693 (1908).

[3] Wheeler v. Northern Colorado Irrigation Co., 10 Colo. 582, 17 Pac. 487, 3 Am. St. Rep. 603 (1887).

water because he is unable to pay in advance for its carriage beyond a season or two." [1]

**§ 446. The journey as a single unit.**

The journey for which a passenger has a right to be received and upon which he enters when he is received, is the whole transit from his point of departure to his destination; the entire journey which he means at that particular time to take. This journey is a single unit of service; for it the carrier is entitled to make a single charge,[2] and the passenger is entitled only to an unbroken carriage.[3] Neither party has a right to break this single unit of service into two. For the reason that the journey is an entirety, the ticket with which a passenger pays his fare is good only for the single journey on which the passenger is then engaged. It is good for any journey which is included within its terms; thus it is good from its starting point to any station short of its destination or from any station between its *termini* and the point of destination. If presented for use and accepted in payment of fare it is at once used, and cannot be used again. That the one payment is for the whole journey well appears from Auerbach v. New York Central & Hudson River Railroad.[4] There a ticket from Buffalo to New York expired on the

[1] In Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060, 63 Am. St. Rep. 841 (1897), it was held that one year was the reasonable unit for the garden sprinkling service.

[2] *England.*—London & N. W. Ry. Co. v. Hinchcliffe, 2 K. B. 32 (1903).

*Australia.*—Davies v. Williamson, 21 New South Wales L. R. (Law) 124 (1900).

[3] *Massachusetts.*—Cheney v. Boston & M. R. R. Co., 11 Met. 121, 45 Am. Dec. 190 (1846).

*New Jersey.*—State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671 (1854).

*Ohio.*—Cleveland, C. & C. R. R. Co. v. Bartram, 11 Ohio St. 457 (1860).

*Pennsylvania.*—Vankirk v. Pennsylvania R. R. Co., 76 Pa. St. 66, 18 Am. Rep. 404 (1874).

[4] 89 N. Y. 281, 42 Am. Rep. 290 (1882).

26th of September, and the bearer took the train for New York on the evening of that day and his ticket was called for and punched. He thus paid his fare for the whole journey in time, although the train did not reach his destination until the next day.[1]

**§ 447. Forfeiture of right to original journey.**

As will be seen the penalty accompanying ejection may be the forfeiture of the right to pursue the original journey. In most cases it is held that even if the passenger who has refused to pay properly is expelled at a regular station and offers to pay the entire fare, he cannot demand further carriage, since he has forfeited his right to be carried on that journey.[2] Where, however, the passenger has a ticket for the station at which he was ejected, but wrongfully claimed that his ticket entitled him to be carried further, he has been held entitled to take the train and ride on to his destination upon paying the additional fare,[3] if the train did not stop there for the purpose of ejecting the plaintiff and he has quietly and submissively yielded to expulsion.

[1] Morningstar v. Louisville & N. R. R. Co., 135 Ala. 251, 33 So. 156, (1902), *accord.*

[2] *United States.*—Missouri, K. & T. Ry. Co. v. Smith, 152 Fed. 608 (1902).

*Georgia.*—Georgia So. & Fla. Ry. Co. v. Asmore, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53 (1891).

*Iowa.*—Hoffbauer v. O. & N. W. R. R. Co., 52 Ia. 342 (1879).

*Maryland.*—Garrison v. United Ry. & E. Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452 (1903).

*New Jersey.*—State v. Campbell, 32 N. J. L. 309 (1867).

*New York.*—Pease v. Delaware, L. & W. R. R. Co., 101 N. Y. 367, 5 N. E. 37, 54 Am. St. Rep. 699 (1886).

*North Carolina.*—Clark v. Wilmington & W. R. R. Co., 91 N. C. 506, 49 Am. Rep. 647 (1884).

*Ohio.*—Railroad Co. v. Skillman, 39 Ohio St. 444 (1883).

*Tennessee.*—Louisville & N. R. R. Co. v. Garrett, 8 Lea (Tenn.), 438, 41 Am. Rep. 640 (1881).

[3] Louisville & N. R. R. Co. v. Breckinridge, 99 Ky. 1, 34 S. W. 702 (1896).

See also Choctaw, O. & G. R. R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963 (1903).

**§ 448. Effect of outright repudiation.**

When, however, the customer alleging no reasonable grounds repudiates all intention of ever paying what the company may demand it is obvious that such a person may be refused further service so long at least as that attitude is manifested. This is well brought out in the quotation from a recent case [1] which follows: "No past violation of contract on the part of a consignee can justify a carrier in failing to discharge a present duty. But in the case at bar, according to the testimony for the appellant, not directly denied by appellee, appellee not only arbitrarily refused to pay demurrage charges which had accrued in the past, but expressed his intention of persisting in his refusal even should such charges be justly incurred in the future. If this be true, appellant was warranted in its refusal to further switch and place cars at appellee's warehouse. By delivering the cars at the warehouse appellant would have lost its lien, and could only have collected its charges from appellee directly, and he had already evidenced his intention of not paying. We know of no principle of law under which anyone can announce an intention of not paying for a particular service, and still rightfully demand that such service shall be rendered; particularly where the charge for such service is admitted to be just and reasonable, and is in fact paid by all others who enjoy the benefit of it." [2]

[1] Yazoo & M. V. R. R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715 (1904). See also Brown v. Interborough R. T. Co., 56 N. Y. Misc. 637, 107 N. Y. Supp. 629 (1907).

[2] To much the same effect are:

*California.*—Fuller v. Azusa Irrigating Co., 138 Cal. 204, 71 Pac. 98 (1902).

*Iowa.*—Mystic Milling Co. v. C., M. & St. P. Ry. Co., 131 Iowa, 10, 107 N. W. 943 (1906).

*Maine.*—Robbins v. Railway Co., 100 Me. 496, 62 Atl. 136, 1 L. R. A. (N. S.) 963 (1905).

*Pennsylvania.*—Smith v. Scranton Gas & Water Co., 5 Lack. L. News, 235 (1899).

**§ 449. Present unit distinguished from past unit.**

It has been seen that as to the particular unit of service which is being rendered the whole payment may be demanded at any time during the service, although part has already been performed. It has, however, seemed to some to follow that payment of whatever may be due from the applicant may be demanded at any time and further service refused if full settlement is not made. But as the general principle is that a unit of service is indivisible, so different units of service should be regarded as wholly distinct. It may be granted that to entitle himself to any service the applicant must pay for the whole unit. It may also be granted that an applicant who has forfeited his right to the present service must apply anew for a new service.[1] But it is submitted that the applicant is entitled to present service upon payment for the present unit, regardless of whether he owes for past services.[2] And it would seem to follow that to refuse future service when payment is offered until arrears shall be paid is, for a public service company, illegal. But as to the legality of such a policy there is a surprising conflict of authority. And in view of the fundamental character of the problem, the question requires the detailed discussion which it receives in the next topic.

*Topic D. Payment of Arrearages Demanded*

**§ 450. Payment for previous carriage not required.**

It has never been held as to common carriage that the payment of compensation for previous carriages can be

[1] A patron of a railroad who has forfeited his right to travel by season ticket during one period may apply again for the next period. Atwater v. Delaware, L. & W. R. R. Co., 48 N. J. L. 55, 2 Atl. 803 (1886).

[2] A subscriber to a telephone who has been cut off for not observing the regulations of the company can apply as a new customer might. State ex rel. v. Kinloch Telephone Co., 93 Mo. App. 349, 67 S. W. 684 (1902).

made a condition of accepting a passenger or taking other goods. Where a person had on one occasion been found riding without showing a ticket, it was held that he could be ejected from that train rightfully, but that he could not on that account be refused at a subsequent time the right of purchasing another ticket.[1] The court considered such a refusal as inconsistent with the public duty of the common carrier, saying: "We think that this misconduct did not justify the company in excluding the relator thereafter from a privilege in which, as a member of the community, he was entitled to participate in common with others of the public. Such a measure of punitive justice has not been granted by any statute, and if inflicted by any regulation of the company—which it is not—would be an unreasonable exercise of the company's power to make rules and regulations for the government of passengers." Another manifestation of the same idea is in another case which holds that a railroad cannot refuse a shipment of freight because back charges for other freight remain unpaid.[2] It is this same policy which makes the carrier's lien upon the goods specific, not general; for as is well known it is not thought proper that the carrier should retain the goods for other charges than for the present service.

**§ 451. Payment of arrearages not generally required.**

As to the obligation to continue a supply when the customer is already in arrears (although he tenders for present service) there has been, and there remains, an irreconcilable conflict of authority. On one hand are the decisions which hold that in refusing to serve those who come with ready payment, the company in question acts

[1] Atwater v. Delaware, L. & W. R. R. Co., 48 N. J. L. 55, 2 Atl. 803 (1886).

[2] East Ky. Ry. v. Holbrook, 4 Ky. Law Rep. 730 (1883).

contrary to its public duty, which is to serve all that apply without discrimination. As was said tersely in a California case [1] of an irrigation company which had adopted this policy: "It was therefore the duty of the defendant under the law as established in this State to furnish the plaintiff water upon tender of the established rates; and this rule precludes the idea that any other duties can be prescribed or imposed, except the tender of the rate as a condition of supplying water as required by law." To show that the policy of requiring payment of arrearages is a helpful device to the company in making its collections is not enough, if the method used is inconsistent with public duty. As to any hardship upon the companies in prohibiting them from collecting back charges in this way, it is enough to say that they need not have given any credit at the outset. As one in public service may always demand prepayment, having given credit, the company must be content as other creditors must be to collect its back bills by legal means. To attempt to make such collections by refusing present service for ready money would seem to be in the face of the public duty.[2]

[1] Crow v. San Joaquin & K. R. C. & Irrigation Co., 130 Cal. 309, 62 Pac. 562 (1900).

[2] Holding this general doctrine as to various services are:

*Alabama.*—Smith v. Birmingham Waterworks, 104 Ala. 315, 16 So. 123 (1893).

*Arkansas.*—Danaher v. Southwestern Telephone & Telegraph Co. 127 S. W. 963 (1910).

*District of Columbia.*—Lloyd v. Gaslight Co., 1 Mackey, 331 (1881).

*Georgia.*—Freeman v. Macon Gaslight & Water Co., 126 Ga. 843, 56 S. E. 61, 7 L. R. A. (N. S.) 917 (1908).

*Maine.*—Wood v. Auburn, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376 (1895).

*Maryland.*—Gaslight Co. v. Colliday, 25 Md. 1 (1866).

*Massachusetts.*—Merrimack Bank v. Lowell, 152 Mass. 556, 26 N. E. 97, 10 L. R. A. 122 (1891).

*Nebraska.*—State v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885).

*Tennessee.*—Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058 (1897).

*Texas.*—Buffalo Bayou Ship Channel Co. v. Milby & Dow, 63 Tex. 492, 51 Am. Rep. 668 (1885);

**§ 452. Cases requiring payment of arrearages.**

But there are other cases equally insistent in holding that if the present applicant owes for a supply given him, he is in no position to demand a further supply even if ready money is tendered for it. Although this is apparently in the face of public duty, much is made in these cases of the argument of the convenience to the company in making its collections. This is ingeniously elaborated in a Washington case [1] thus: "The condition imposed, that the company might refuse to furnish water to an applicant refusing to pay for it a sum due for water thereunder, is in one sense a security for the payment thereof. Instead of forming an estimate of the water that would likely be used, and requiring a deposit in advance of a sufficient sum of money to cover the same, or requiring other security for the payment thereof, the water company provides that at stated periods payments shall be made in order that a large sum may not accumulate, it being willing to take its chances for a stated time without other security; surely this is more lenient than either to demand a bond or other security, or a deposit of a sum of money in advance large enough to be reasonably certain of covering the sum that should become due." However, it is not enough in public employment to show that a right would be valuable to justify it; nor even to show that it is policy which is often employed in private business. It must be

Southwestern Telephone & Telegraph Co. v. Luckett (Tex. Civ. App.), 127 S. W. 856 (1910).

A rule requiring those whose water supply has been cut off to pay a sum for having the water turned on again upon payment is always held unreasonable:

*Missouri.*—State ex rel. v. Jones, 141 Mo. App. 299, 125 S. W. 1169 (1910).

*Nebraska.*—American Waterworks v. State, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447, 50 Am. St. Rep. 610 (1895).

[1] Tacoma Hotel Co. v. Tacoma Light & Water Co., 3 Wash. 316, 28 Pac. 516, 14 L. R. A. 669, 28 Am. St. Rep. 35 (1891).

admitted that there are many cases which support this right to insist upon the payment of arrearages.[1] But it should be said, however, that in several of these cases the right to shut off the supply for past default was established by legislation or by ordinance, either by direct provision or by clause in the charter.

**§ 453. Applicant in default at other premises.**

In the light of the usual arguments upon which the cases divide upon the general question, it would seem that the case where the applicant is in default at other premises for the same service should fall within the general rule. And it is usual to decide this case according to the general doctrine held in the jurisdiction—some cases consistently holding that arrears at other premises cannot bar the applicant for present service; other cases holding that such arrears should bar the applicant.[2] What is surpris-

[1] In the following cases involving various services, it has been held that the payment of arrearages is prerequisite:

*California.*—Sheward v. Citizens' Water Co., 90 Cal. 635, 27 Pac. 439 (1891).

*Indiana.*—Irvin v. Rushville Telephone Co., 161 Ind. 524, 69 N. E. 258 (1903).

*Kansas.*—Shiras v. Ewing, 48 Kans. 170, 29 Pac. 320 (1892).

*Minnesota.*—State v. Board of Water Commissioners, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581 (1908).

*Missouri.*—McDaniel v. Waterworks, 48 Mo. App. 273 (1892).

*New York.*—People v. Manhattan Gaslight Co., 45 Barb. 136 (1865); Brass v. Rathbone, 153 N. Y. 435, 47 N. E. 905 (1897).

*Ohio.*—Bellaire Goblet Co. v. Findlay, 5 Oh. Cir. Ct. 418 (1891).

*Oregon.*—Mackin v. Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 49 L. R. A. 596 (1900).

*Pennsylvania.*—Brumm, Appeal of (Pa.), 12 Atl. 855 (1888); Girard Life Insurance Co. v. Philadelphia, 88 Pa. St. 393 (1879); Smith v. Scranton Gas & Water Co., 5 Lack. L. News, 235 (1899).

*Washington.*—Jenkins v. Columbia Land Co., 13 Wash. 502, 43 Pac. 328 (1896).

[2] The following cases, for example, hold that a supply may be cut off at one place for a bill owed by the applicant for supply at other premises:

*New York.*—People v. Manhattan Gaslight Co., 45 Barb. 136 (1865).

*Oregon.*—Mackin v. Portland Gas

ing, if not significant, is to find certain jurisdictions which hold against the applicant in general, not sure enough of their ground to hold against him in this particular case apparently within the general rule.[1]

**§ 454. Payment of collateral claims cannot be demanded.**

It would probably be generally conceded that the payment of wholly independent claims cannot be demanded as a condition of supplying present service. Certainly a gas company could not refuse to supply one who owed it for coke sold.[2] And it has been held in Tennessee [3] that a water company could not refuse to supply a customer whose bill for services and material was unpaid. "The defendant in the present case cannot justify its declination to furnish water to the plaintiff by the fact of his failure to pay the whole or a part of his outstanding duebill, given for water and piping furnished a year or two before. Upon tender of the regular rates, he was entitled to the water like other persons, and without reference to his past-due obligation. The company had given him credit for the matters covered by the duebill, and could not thereafter coerce payment by denying him a present legal right."

Co., 38 Oreg. 120, 61 Pac. 134, 49 L. R. A. 596 (1900).

*Tennessee.*—Jones v. Mayor of Nashville, 109 Tenn. 550, 72 S. W. 985 (1903).

*England.*—Montreal Gas Co. v. Cadieux, A. C. 589 (1899).

[1] The following cases hold that a supply cannot be refused at one place for arrears for supply furnished the applicant at other premises:

*District of Columbia.*—Lloyd v. Gaslight Co., 1 Mackey, 331 (1881).

*Maryland.*—Gaslight Co. v. Colliday, 25 Md. 1 (1866).

*Massachusetts.*—Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432 (1898).

*New Jersey.*—Dayton v. Quigley, 29 N. J. Eq. 77 (1878).

[2] See Re Commercial Bank and London Gas Co., 20 Up. Can. Q. B. 233 (1860).

[3] Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S. W. 1058 (1897).

**§ 455. Cannot urge another's default.**

It is plain enough upon these principles that one cannot be required to pay claims against another. Thus the vessel of one owner cannot be affected by the unpaid tolls of another ship belonging to a stranger.[1] And it was recently held in Missouri [2] that "there is no more reason for compelling a married woman to pay her husband's debt, for the payment of which she is not legally bound, than there would be for compelling her to pay the debt of a stranger."

**§ 456. No requirement to pay arrears of predecessors.**

It is well agreed that this disability is a personal matter. When a householder applies to a gas or water company for a supply of gas or water at his house, and tenders the price, if it is required, or a deposit in advance, he cannot be refused because an independent earlier occupant of the premises is in arrear for his gas or water.[3] To so hold

[1] Buffalo B. S. C. Co. v. Milby & Dow, 63 Tex. 492, 51 Am. Rep. 668 (1885).

[2] Vanderberg v. Gas Co., 126 Mo. App. 600 (1907).

[3] The common-law view is shown by the following cases:

*Illinois.*—City of Chicago v. Northwestern Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803, 1 L. R. A. (N. S.) 770 (1905).

*Kentucky.*—Covington v. Ratterman, 128 Ky. 336, 108 S. W. 297, 17 L. R. A. (N. S.) 923 (1908).

*Louisiana.*—New Orleans G. L. & B. Co. v. Paulding, 12 Rob. (La.) 378 (1845).

*Maryland.*—Gaslight Co. v. Colliday, 25 Md. 1 (1866).

*Massachusetts.*—Turner v. Revere Water Co., 171 Mass. 329, 50 N. E. 634, 40 L. R. A. 657, 68 Am. St. Rep. 432 (1898).

*Mississippi.*—Burke v. City of Water Valley, 87 Miss. 732, 40 So. 820, 112 Am. St. Rep. 468 (1905).

*New Jersey.*—Dayton v. Quigley, 29 N. J. Eq. 77 (1878); Johnson v. Atlantic City Gas Co., 65 N. J. Eq. 129, 56 Atl. 550 (1903).

*Pennsylvania.*—Miller v. Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974 (1903).

*South Carolina.*—Poole v. Paris Mt. Water Co., 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923 (1908).

*Washington.*—Linne v. Bredes, 43 Wash. 540, 86 Pac. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1068 (1906).

*England.*—Sheffield Waterworks

would in effect decide that the supply is to the premises, not (as it plainly is) to the occupants. However, it is possible for legislative action to alter this common law and to provide for such a charge upon the premises either by statute or charter provision, or by ordinance or (according to a very few cases) by regulation of which all concerned are apprised.[1]

**§ 457. Assumption of predecessor's arrears.**

The distinction should be noted, that where the incoming occupant can fairly be said to have assumed the obligations of his predecessor he will be held to succeed to his position and may be obliged to pay his arrears when that rule prevails.[2] Whether a trustee in bankruptcy or a receiver of a corporation, as a tenant, is independent of the bankrupt, his predecessor, has been discussed. But the usual rule is that a trustee who elects to remain in

Co. v. Wilkinson, 4 C. P. D. 410 (1879).

[1] The possibility of arranging this by such methods is shown in:

*Georgia.*—City of Atlanta v. Burton, 90 Ga. 486, 16 S. E. 214 (1892).

*Minnesota.*—State v. Board of Water & Light Com'rs, 105 Minn. 472, 117 N. W. 827 (1908).

*New Jersey.*—Vreeland v. O'Neil, 36 N. J. Eq. 399, affirmed in 37 N. J. Eq. 574 (1883); Hudson Trust & S. Inst. v. Carr-Curran Paper Co., 58 N. J. Eq. 59, 43 Atl. 418 (1899); Howe v. Orange, 70 N. J. Eq. 648, 62 Atl. 777 (1906).

*New York.*—Silkman v. Water Commissioners, 71 Hun, 37, 24 N. Y. Supp. 806 (1893).

*Pennsylvania.*—Altoona v. Shellenberger, 6 Pa. Dist. Rep. 544 (1897); Brumm v. Pottsville Water Co., 11 Cent. Rep. 792 (1888); Brumm's Appeal, 22 Wk. N. Cas. 137 (1888); Girard Life Ins. Co. v. Philadelphia, 88 Pa. St. 393 (1879); Appeal of the City of Harrisburg, 107 Pa. St. 102 (1884); Commonwealth v. Philadelphia, 132 Pa. St. 288, 19 Atl. 136 (1890); Miller v. Wilkes-Barre Gas Co., 206 Pa. St. 254, 55 Atl. 974 (1903); Girard Life Ins. Co. v. Philadelphia, 12 Phila. 293 (1878).

*Tennessee.*—Jones v. Mayor of Nashville, 109 Tenn. 550, 72 S. W. 985 (1903).

*England.*—East London Waterworks Co. v. Kellerman, 2 Q. B. 72 (1892).

[2] *Tennessee.*—Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985 (1902).

*England.*—Gaslight Co. v. Cannon Brewery Co., 1 K. B. 593 (1903).

possession after the adjudication of bankruptcy is an independent tenant, and may demand service without first paying the bankrupt's arrears, and so may a receiver.[1]

**§ 458. Cannot shut off service for disputed arrearages.**

Where the doctrine is held that the company may refuse to continue service while arrearages are unpaid, the courts are seldom willing to give the company the power to compel settlement of disputed claims by refusing to deal with a customer until he comes to their terms. Here again it seems that as the exception is not far removed from the general rule, the courts do not have the courage to apply their principle in peculiarly hard cases. At all events the cases almost universally hold that a company cannot refuse to give present service or cut off existing service for refusal to settle outstanding arrearages which are in dispute.[2] Mandamus will issue to compel the giving

[1] *New Jersey.*—Coe v. New Jersey Midland Ry. Co., 30 N. J. Eq. 440 (1879).

*Massachusetts.*—Cox v. Malden & M. Gaslight Co., 199 Mass. 324, 85 N. E. 180, 17 L. R. A. (N. S.) 1235 (1908).

[2] *Alabama.*—Bienville Water Co. v. Mobile, 112 Ala. 260, 20 So. 742, 33 L. R. A. 59, 57 Am. St. Rep. 28 (1895).

*Indiana.*—Xenia Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 147 (1896).

*Iowa.*—Graves v. Key City Gas Co., 83 Iowa, 714, 50 N. W. 283 (1891).

*Louisiana.*—Ernst & Co. v. New Orleans Waterworks Co., 39 La. Ann. 550, 2 So. 415 (1887).

*Maine.*—Wood v. City of Auburn, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376 (1895).

*Mississippi.*—Cumberland Tel. & Tel. Co. v. Baker, 85 Miss. 486, 37 So. 1012 (1905).

*Nebraska.*—State v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885).

*New York.*—Van Nest Land Co. v. New York Water Co., 7 N. Y. App. Div. 295, 40 N. Y. Supp. 212 (1896); Sickles v. Manhattan Gaslight Co., 64 How. Pr. 33 (1882); s. c., 66 How. Pr. 314 (1884); McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785 (1900); Jones v. Rochester Gas Co., 7 N. Y. App. Div. 474, 39 N. Y. Supp. 1110, affirmed 158 N. Y. 678, 52 N. E. 1124 (1896).

*Oregon.*—Mackin v. Portland Gas Co., 38 Oreg. 120, 61 Pac. 134, 49 L. R. A. 596 (1900).

of service under such circumstances or injunction to prevent a threatened shutting off. Although there thus can be no shutting off *pendente lite*, as soon as the obligation is settled against the consumer by judgment being cast against him, his supply can be shut off until he satisfies the judgment.[1]

**§ 459. Character of the dispute.**

It should be added that if his claim is obviously unreasonable he cannot insist upon protection of a court of equity to litigate a frivolous claim.[2] If, on the other hand, the charge disputed is obviously illegal the injunction may be made permanent.[3] Note also that a patron who has a counterclaim of a doubtful character cannot refuse to make further payments for service by setting this against his current bills.[4] None of these problems will bother a court which holds that there can be no shutting off for arrearages under any circumstances.

**§ 460. Waiver of right to refuse.**

In a few cases it has been suggested that where an old bill has been passed over and later installments ac-

*Pennsylvania.*—Sewickley School Dist. v. Ohio Valley Gas Co., 154 Pa. St. 539, 25 Atl. 868 (1893).

*South Carolina.*—Poole v. Paris Mt. Water Co., 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923 (1908).

*Tennessee.*—O'Rourke v. Citizens' Street Ry. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639 (1899).

[1] *New York.*—McEntee v. Kingston Water Co., 165 N. Y. 27, 58 N. E. 785 (1900); People v. Manhattan Gaslight Co., 45 Barb. 136 (1865).

[2] *Louisiana.*—Ernst & Co. v. New Orleans Waterworks Co., 39 La. Ann. 550, 2 So. 415 (1887).

*Pennsylvania.*—Pennsylvania Iron Co. v. Lancaster, 17 Lanc. L. R. 161 (1900).

[3] *Minnesota.*—Gordon & Ferguson v. Doran, 100 Minn. 343, 111 N. W. 272, 8 L. R. A. (N. S.) 1049 (1907).

*New Jersey.*—Borough of Washington v. Washington Water Co., 70 N. J. Eq. 254, 62 Atl. 390 (1905).

[4] Buffalo County Telephone Co. v. Turner, 82 Neb. 841, 118 N. W. 1064, 9 L. R. A. (N. S.) 693 (1908).

See also State v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. St. Rep. 404 (1885).

cepted the company cannot make such arrearages the basis for a refusal to continue service.[1] But if this has happened by inadvertence the company may, it is held, insist upon its rights, as in one case where the person in arrears changed his residence so that it was not discovered for a time that he was the person in arrears.[2] And where an agreement between a water company and a consumer, separate and distinct from the contract for water supply, provides that the rent shall be paid in advance, the company's recovery by suit of an installment for a particular period will not preclude it from subsequently setting up a right to shut off the water during such period for nonpayment therefor.[3] And similarly where the subject is covered by a special contract, it is still held that the supply may be cut off for arrears.[4]

[1] Wood v. City of Auburn, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376 (1895).

[2] People v. Manhattan Gaslight Co., 45 Barb. (N. Y.) 136 (1865).

[3] Hieronymus v. Bienville Water Co., 131 Ala. 447, 31 So. 31 (1901).

[4] Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 Pac. 329 (1904).

# CHAPTER XIV

## PUBLIC DUTY AS TO DEPENDENT SERVICES

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**§ 470. Nature of the problem.**

A special problem under the general head of the true extent of public duty is whether in dealing with dependent services those who conduct the principal service can make such arrangements as they please with those who apply for such special privileges, or whether there is a public duty in the premises requiring that equal facilities shall be granted. This subject has such commercial importance that it is given separate treatment in this chapter; for these subsidiary services which are dependent upon special privileges from the principal service carry on a great business in recent times. Although the most of litigation upon the general issue involves the transportation services, because of their importance as a commercial matter, still the same problem at times presents itself in certain other public callings, so that it really constitutes a general problem of public service.

*Topic A. Public Duty Involved*

**§ 471. The argument is close.**

There has always been—and there remains—a square conflict of authority as to whether the law extends so far as to cover this situation. On one side are the jurisdictions conservative in attitude, which hold that there is no public duty involved and that therefore the carrier may, for example, discriminate among expressmen. On the other hand are the progressive jurisdictions which hold that there is a public obligation involved and that the inn-

keeper may not, therefore, admit certain hackmen to its premises while excluding others. And in various other subsidiary businesses of the same sort, where those who offer a service to the public are dependent to a considerable extent for opportunity to conduct their calling upon obtaining special privileges, there is the same conflict of authority.

**§ 472. No direct duty to the dependent service.**

At the beginning of the controversy the ground may be cleared by the admission that there is no direct duty owed to those who conduct these dependent services. The railroad company surely owes no duty to hackmen who would ply their trade upon station premises; its sole duty is to its passengers.[1] Similarly a telegraph company owes no duty to a telephone company which wishes to install an instrument,[2] its sole duty being to its patrons. It cannot be said that the principal business has ever undertaken the reception of the subordinate servitors upon a public basis. Not even in the case of the expressman can it usually be said that the railroad has undertaken to be a common carrier of common carriers.[3] For the plain fact is that it does not purport to act as such but only makes special contracts with particular forwarders for special kinds of business conducted in an unusual way. And certainly an innkeeper owes no duty to coachmen who would solicit business from his guests. For those hackmen

[1] Thus solicitors driving special omnibuses for particular hotels may be kept off railroad premises.

*Arkansas.*—Hot Springs v. Curry, 64 Ark. 152, 41 S. W. 55 (1897).

*Missouri.*—Laddonia v. Poor, 73 Mo. App. 465 (1898).

[2] People v. Western Union Telegraph Co., 166 Ill. 15, 46 N. E. 731 (1897).

[3] Thus a man carrying a bag of express packages may be kept off a line of boats as a passenger.

*United States.*—The R. D. Martin, 11 Blatch. 233 (1873).

*New York.*—Barney v. Oyster Bay & H. Steamboat Co., 67 N. Y. 301 (1876).

are not wayfarers seeking necessary entertainment, neither do they tender the innkeeper his usual rates for entertainment.[1]

**§ 473. Real duty is to patrons themselves.**

On the other hand that there is some public duty in the premises is plain. In the case of the express service the modern railroad owes a duty of some sort in respect to the transportation of small and valuable parcels safely and quickly. But to whom is this duty owed? Certainly not to the subordinate carrier, as has been seen. The duty, if any, that it owes, seems to be rather to the general public who ship through the expressman. "An express company engaged in the business of transporting small packages has as good a right to the benefits of the railroad as the owners of the packages possess in person. It is impossible that they can all appear in person to claim their rights, and it is sufficient that they are represented by agents who are intrusted with their goods and have a special property in them." [2] So of the hackmen at railway stations, the duty is plainly to the passenger himself. Thus it is admitted by all that a railroad owes such duties to its incoming and outgoing passengers that it cannot exclude from its station driveways hackmen bringing passengers, or hackmen directed by passengers to call for them.[3] For of course no one would go so far as to deny the

[1] See State v. Steele, 106 N. C. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. Rep. 573 (1890).

[2] Per Lewis, C. J., in Sandford v. Catawissa R. R. Co., 24 Pa. St. 378, 64 Am. Dec. 667 (1855).

In Rogers Locomotive & Machine Works v. Erie Ry. Co., 20 N. J. Eq. 379 (1869), the defendant railroad company entered into an arrangement with a locomotive express concern for the handling of all locomotives offered it for transportation. It was held that plaintiff, a shipper of locomotives, could object to this scheme to defeat him in his individual right to have his property transported.

[3] *Rhode Island.*—Griswold v. Webb, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302 (1889).

*Tennessee.*—Summit v. State, 8 Lea, 413, 41 Am. Rep. 637 (1881).

duty of the carrier of passengers to permit free access and egress for those whom it is serving. Indeed in this aspect the duty to give passengers access to hackmen is the same as the duty to admit persons assisting passengers.

**§ 474. Conservative view of the duty involved.**

Even when it is once established that there is a public duty toward their own patrons in respect to the subordinate service involved, there remains the conflict of authority as to the extent to which this duty goes. According to the conservative view, the principal company fulfills its duty by making provision for the service desired, which may be done by an exclusive contract with one concern. The decisions permitting this were first made upon the elementary ground plainly avowed that as such service was not within any real public profession, there was no public obligation in the premises whatsoever.[1] But of late years those who support these decisions have felt obliged to defend them upon grounds of public policy. They point to the public inconvenience involved in having boisterous hackmen of all sorts at railway stations; they insist upon the waste of duplication of express services over the same railroad. And very recently pressed further they suggest that it may be that in making these exclusive arrangements public interests should not be left without consideration.[2]

**§ 475. Progressive view of the duty involved.**

According to the progressive view the whole law of public service applies to the situation throughout; and the exclusive contract is held illegal as a necessary con-

[1] For example, see the Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. 542, 628 (1886).

[2] For example, read Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811 (1903).

sequence of that law.[1] It is believed by these radical persons who take the progressive view that however much it is modified the conservative view of this matter cannot give the public service the full protection which this progressive view assures. For if the public duty does not go to the extent of preventing discrimination in performing it, it seems that none of the law of public service can be applied between the railroad company and the express company, for example. And it would seem to follow that any express company, therefore, may be justified in charging extortionate prices. Whatever may be the inconveniences of competition, it is usually worth more than it costs. Moreover these services are not of that class where enormous sums must be spent in providing a duplicate equipment, nor where the public can only get adequate service by the establishment of a legalized monopoly. Even if hack rates are regulated by law it is the maximum that is fixed and the public loses the chance of reaching the minimum by competition.

**§ 476. Necessity for the public service law.**

That the monopoly system works well in particular instances does not alter the fact that there is real danger in leaving the situation without the full restraint of the whole law; without the whole law the monopolist will be able to exploit to some extent those whom it is his duty to serve. But even if the common carrier at times exercises his discretion by seeing to it that the dependent service is provided under fair conditions, the danger remains in leaving this important situation without law. For if there is abuse of discretion and those who need the dependent service are systematically exploited, there will be no law in reserve by which redress is possible. And if

[1] See the language in McDuffee v. Portland & R. R. R. Co., 52 N. H. 430, 13 Am. Rep. 72 (1873).

experience in dealing with the public service companies is teaching anything, it is showing that only the most comprehensive law will prove effectual; for if a way of escape is left, it will be found. The time has long since passed when *laissez faire* may be put forward as the better method of dealing with any problem of public duty.[1]

*Topic B. Transportation Services in Particular*

**§ 477. Express companies: conservative view.**

As a matter of fact this problem of the extent of the duty of the principal service to those conducting a subordinate service has arisen almost exclusively as yet in respect to transportation services; and the most important instance of this is the express service carried on over the railroad systems. The leading authority upon this whole subject is undoubtedly the Express Cases.[2] These suits were all begun by expressmen against railways to compel them to give them respectively the express facilities on the several lines of railway which they had previously enjoyed by contract and of which they had been dispossessed by notice given in accordance with the terms of exclusive contracts made with favored companies. Judgments below had been rendered in favor of the express companies from which the railroad companies appealed.[3] The cases were elaborately argued; and the whole history of the course of dealings that had gone on between the express companies and the railroad companies was discussed. The decision of the majority of the court went

[1] See the language in Montana Union Ry. Co. v. Langois, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. Rep. 745 (1890).

[2] 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. 542, 628 (1886).

[3] The Express Cases, *supra*, overruled what had just previously been the weight of authority in the Federal courts. See Southern Express Co. v. Memphis R. R. Co., 2 McCrary, 570 (1881); Wells, Fargo & Co. v. O. Ry. & Navigation Co., 8 Sawyer, 600 (1883); United States v. M. & L. R. R. R. Co., 6 Fed. 237 (1881); Wells Fargo & Co. v. Northern Pac. Ry. Co., 23 Fed. 469 (1884).

off upon this evidence, as may be seen in Mr. Chief Justice Waite's conclusion in the majority opinion: "In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. While it has uniformly been the habit of railroad companies to arrange, at the earliest practical moment, to take one express company on some or all of their passenger trains, or to provide some other way of doing an express business on their lines, it has never been the practice to grant such a privilege to more than one company at the same time, unless a statute [1] or some special circumstances made it necessary or desirable." [2]

## § 478. Comment thereon.

The arguments from policy that are urged in support

[1] This is governed by statute in some jurisdictions; for example, today in Massachusetts by statute, such number of local expressmen shall be permitted to operate over a given route as the railroad commissioners shall decide. (Rev. Laws, chap. 111, sec. 241.) See Kidder v. Fitchburg Ry. Co., 165 Mass. 398, 43 N. E. 115 (1896).

As to a general Canadian statute, see Vickers v. Canadian Pacific Ry. Co., 13 Ont. App. 210 (1908).

[2] In accord with the Express Cases, *supra*, are:

*United States.*—Baltimore & O. Ry. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560 (1900).

*California.*—Pfister v. Central Pac. R. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404 (1886).

*Illinois.*—Blank v. Ill. Cent. R. R. Co., 182 Ill. 332, 55 N. E. 332 (1899), *semble.*

*Indiana.*—Louisville, N., A. & C. Ry. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 58 Am. St. Rep. 348, 38 L. R. A. 93 (1896), *semble.*

*Kentucky.*—Davis v. Chesapeake & O. Ry. Co., 29 Ky. L. Rep. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458 (1906), *semble.*

*Maryland.*—Dulaney v. United Ry. & El. Co., 104 Md. 423, 65 Atl. 45 (1906).

*Massachusetts.*—Sargent v. Boston & L. R. R., 115 Mass. 416 (1874).

*North Carolina.*—Atlantic Express Co. v. Wilmington & W. R. R. Co., 111 N. C. 463, 16 S. E. 393 (1892), overruling Alsop v. Southern Exp. Co., 104 N. C. 278, 10 S. E. 297 (1889).

*Vermont.*—Robinson v. St. Johnsbury & L. C. Ry. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 129 (1907), *semble.*

of these conservative cases are not conclusive, although they have a certain force. It is true that it is somewhat more difficult for the railroads to handle three distinct expresses than one, but not more difficult than many problems of railroading that are part of every day traffic handling. Subdivision of express cars upon light runs, and more development of the special train for express matter, would solve the difficulty; and the railroad is protected in any event by the right to charge a fair price for its services based upon the cost of service. Again, it is said that large express companies are better than a greater number of smaller companies. It should be pointed out, however, that the doctrine of the Express Cases may be used to exclude the national express companies with their full equipment from any railroad system, the directors of which favor some local company.

**§ 479. Express companies: radical view.**

To bring out the difference of opinion upon this important matter it may be well to give at some length, one of the leading cases upon the other side of this controversy. The most radical decision upon this side is to be found in McDuffee v. Portland and Rochester Railroad.[1] This was an action on the case by the plaintiff, an expressman, against the defendant railway for not furnishing the plaintiff terms, facilities, and accommodations for his express business on the defendants' road, reasonably equal to those furnished by the defendants to the Eastern Express Company. The defendants demurred to the declaration, which demurrer the Supreme Court finally discharged. The gist of Chief Justice Doe's opinion may be seen from the following extract: "A railroad corporation, carrying one expressman, and enabling him to do all the express business on the line of their road, do

[1] 52 N. H. 430, 13 Am. Rep. 72 (1873).

hold themselves out as common carriers of expresses; and when they unreasonably refuse, directly, or indirectly, to carry any more public servants of that class, they perform this duty with illegal partiality. The legal principle which establishes and secures the common right, being the perfection of reason, the right is not a mere nominal one, and is in no danger of being destroyed by a quibble.[1]

**§ 480. Discussion thereof.**

The strongest argument for the progressive view may be developed from the principles laid down in the opinion just quoted. If the public duty in this matter does not go to the extent of preventing discrimination in performing it, none of the law of public service applies between the railroad company and the express company; and it follows that any express company may be charged extortionate prices. Such unreasonable charges, if not forbidden, will inevitably react upon the general shipping public to whom, by the hypothesis, a public duty is owed to provide adequate service for reasonable rates. It may be urged that the express business itself is a public calling, and that therefore the express companies themselves are bound to give satisfactory service at reasonable rates. But their duty is relative; if they must pay extortionate prices, they may charge these against the general shipping

[1] In *accord* see:

*Maine.*—New England Exp. Co. v. Maine C. R. R., 57 Me. 188, 2 Am. Rep. 31 (1869); International Exp. Co. v. Grand Trunk Ry., 81 Me. 92, 16 Atl. 370 (1888).

*New Jersey.*—Rogers L. & M. Wks. v. Erie R. R. Co., 20 N. J. Eq. 379 (1869).

*Pennsylvania.*—Sanford v. Catawissa R. R. Co., 24 Pa. St. 378, 64 Am. Dec. 667 (1855).

*Texas.*—State v. Missouri, K. & T. Ry. Co., 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783 (1906).

*England.*—Pickford v. Grand Junction Ry. Co., 10 M. & W. 399 (1842); Parker v. Great Western Ry. Co., 7 M. & G. 253 (1844); Parker v. Great Western Ry., 11 C. B. 545, 583 (1851).

public as necessary operating expenses. Therefore if the whole law governing public duty is not applied between the railways and the expressmen it would seem to be impossible in any entirely satisfactory way to protect by the law the shippers of express matter from the machinations of those who are concerned with transporting it.

**§ 481. Exclusive contracts with private car lines.**

The doctrine of the Express Cases is continually hampering the common law in dealing with interstate transportation. Within the last few years public opinion has been much aroused against the exclusive arrangements entered into between the railways and the various private car lines. It is pretty generally agreed that what ought to be done in dealing with the private car lines is to apply to the whole situation the coercive law that regulates public calling. Either the railways ought to be obliged to conduct these special services themselves, furnishing their own cars, or if they decide upon a different policy they should be obliged to haul the cars of as many private car lines as choose to undertake the business. But the conservative doctrines held by the Supreme Court of the United States stand in the way of the immediate application to interstate commerce of any such progressive views as these. In the meantime, in the absence of efficient regulation by thorough-going law, those private car lines, the refrigerator car lines particularly, that have exclusive agreements with the railways are showing very clearly what may happen when a common carrier is permitted to foster a monopoly in a dependent service. Similar issues have been raised as to private car lines for the transportation of live stock; but the Federal courts have applied the doctrine of the Express Cases to them as in duty bound. The leading case on this point seems to be United States ex rel. Morris v. Delaware, Lacka-

wanna & Western Railroad Company [1] in which Mr. Justice Wallace said: "It is no part of the common-law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike, and while it is unquestionably their duty to furnish suitable and adequate facilities for all reasonable necessities of the business they engage in, they may nevertheless choose their own appropriate means of carriage." [2]

**§ 482. Arrangements for hauling sleeping cars.**

Another important case since the Express Cases which came up for decision in the Supreme Court of the United States relating to sleeping car service really involves the same general issue.[3] In the leading case an exclusive contract was held valid by the terms of which a railroad company gave a palace-car company the exclusive right for fifteen years to furnish parlor and sleeping cars on all passenger trains of the railroad company, the railroad company binding itself not to contract with any other company to run the same class of cars over its lines during that period. The court felt that there was no public policy violated as there was no public duty involved. An extract from the opinion of Mr. Justice Harlan shows that this law still continues: "The defendant was under a duty arising from the public nature of its employment to furnish for the use of passengers upon its lines, such accommodations as were reasonably required by the ex-

[1] 40 Fed. 101 (1889).

[2] But the railroad in making its special contract with a private car line cannot stipulate against liability for personal injuries to those concerned. See Baker v. Boston & M. R. R. Co., 74 N. H. 100, 65 Atl. 386 (1906).

[3] Chicago, St. L. & N. O. R. Co. v. Pullman Car Co., 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. 490 (1890).

There have recently been cases holding the same doctrine:

*Colorado.*—Denver & R. G. R. R. Co. v. Whan, 39 Colo. 230, 89 Pac. 39, 11 L. R. A. (N. S.) 432 (1908).

*Texas.*—Fort Worth & D. C. Ry. Co. v. State, 99 Tex. 34, 87 S. W. 336, 70 L. R. A. 950 (1905).

isting conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendants' lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them." [1]

**§ 483. Hack service: conservative view.**

It is maintained by many courts that the railroad company is under no public duty to admit hackmen to its station grounds to solicit business. One of the strongest cases for the railway in this matter in recent years is New York, New Haven & Hartford Railroad Company v. Scovill.[2] In that case it appeared from the complaint that the plaintiff by its board of directors adopted a regulation excluding from its station grounds all persons who, without special permission in writing, should come to solicit the carriage of passengers or their luggage. The defendant, knowing the regulation, soon afterwards entered upon its station grounds in Middletown to solicit

[1] It has been remarked of this situation as of other relationships of this sort that as a railroad company is under no legal duty to receive a sleeping car from the Pullman Company with its employés thereon it may make special contracts limiting its liability.

*Illinois.*—Chicago, R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187 (1905).

*Indiana.*—Russell v. Pittsburg, C., C. & St. L. Ry. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214 (1901).

[2] 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159 (1898).

business of that description. This was a bill for an injunction to stop this practice. The injunction was granted in the lower court, but in the higher court this was set aside. Mr. Justice Baldwin holding that the regulation was reasonable: "Such a grant was within its lawful powers, provided its terms were not inconsistent with the reasonable accommodation of the passengers upon its road. Nothing appears on the record to indicate any such inconsistency. It may well be more convenient for them to deal with a single local carrier than to be met, on alighting from their train, by importunate solicitations from a number of rival competitors for their custom; and, in the absence of averments to the contrary, it is to be presumed that the prices at this stand are fair, and the service sufficient. If any of them prefer that of some other person, they can secure it by an order in advance, which would justify his entrance on the grounds; or by passing by the stand established there, and going into the streets outside, to engage whomsoever they think fit." [1]

[1] To the same effect are:

*United States.*—Donovan v. Pennsylvania Co., 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. 91 (1905), affirming 124 Fed. 1016, 60 C. C. A. 168, 120 Fed. 215, 57 C. C. A. 362, 116 Fed. 907.

*Colorado.*—Union Depot & Ry. Co. v. Meeking, 42 Colo. 89, 94 Pac. 16, 126 Am. St. Rep. 145 (1908).

*Georgia.*—Kates v. Atlanta Bag. & Cab Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 (1898).

*Massachusetts.*—Old Colony R. R. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661, B. & W. 166 (1888); Boston & A. R. R. Co. v. Brown, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418 (1900); Boston & M. R. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275 (1900).

*Minnesota.*—Godbout v. Union Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532 (1900).

*New Hampshire.*—Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811 (1903), overruling on rehearing 69 N. H. 650, 45 Atl. 96, 76 Am. St. Rep. 204.

*New York.*—Brown v. New York C. & H. R. R. R. Co., 151 N. Y. 674, 46 N. E. 1145 (1897); New York C. & H. R. R. R. Co. v. Flynn, 74 Hun, 124, 26 N. Y. Supp. 859 (1893); New York C. & H. R. R. R. Co. v. Sheeley, 27 N. Y. Supp. 185 (1893); New York C. & H. R. R. R. Co. v. Warren, 64 N. Y. Supp. 781, 31 Misc. Rep. 571 (1900).

**§ 484. Objections thereto.**

The practical inconvenience that the Justice feels could be met by some reasonable regulation of the sort universally supported, confining all hackmen behind a bar in the station and by other requirements of orderly conduct.[1] And if the railroad company does not take this up, the city may pass ordinances to this end.[2] But regulations which arbitrarily admit one line of hacks to the station and exclude another or give one a better position than another are different matters, and whether they

*Ohio.*—Snyder v. Depot Co., 19 Ohio Cir. Ct. 368 (1899); State v. Union Depot Co., 71 Ohio St. 379, 73 N. E. 633, 68 L. R. A. 792 (1905).

*Rhode Island.*—New York, N. H. & H. R. R. Co. v. Bork, 23 R. I. 218, 49 Atl. 965 (1901).

*Utah.*—Oregon Short Line Ry. v. Davidson, 33 Utah, 370, 94 Pac. 10, 16 L. R. A. (N. S.) 777 (1908).

*England.*—Painter v. London, B. & S. C. Ry. Co., 2 C. B. (N. S.) 702 (1857).

*Australia.*—Borsum v. Hardie, 23 Vict. Sup. Ct. 479 (1898).

[1] Regulations of the company of this sort are valid:

*Indiana.*—Lucas v. Herbert, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376 (1897).

*Massachusetts.* — Commonwealth v. Power, 7 Met. 596, 41 Am. Dec. 465 (1844).

*Michigan.*—Cole v. Rowen, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848 (1891).

*Pennsylvania.*—Smith v. N. Y., L. E. & W. R. R. Co., 149 Pa. St. 249, 24 Atl. 304 (1892).

[2] Municipal ordinances of this sort are valid:

*Alabama.*—Lindsay v. Mayor & City Council of Anniston, 104 Ala. 257, 16 So. 545, 27 L. R. A. 436, 53 Am. St. Rep. 44 (1893).

*Arkansas.*—Emerson v. McNeil, 84 Ark. 552, 106 S. W. 479, 15 L. R. A. (N. S.) 715 (1907).

*Colorado.*—Colorado Springs v. Smith, 19 Colo. 554, 36 Pac. 540 (1894).

*Illinois.*—Danville v. Noone, 103 Ill. App. 290 (1901).

*Indiana.*—Veneman v. Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100 (1888).

*Kansas.*—Ottawa v. Bodley, 67 Kan. 178, 72 Pac. 545 (1903).

*Minnesota.*—St. Paul v. Smith, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296 (1880).

*Ohio.*—Moerder v. Fremont, 19 Ohio Cir. Ct. 394 (1899).

*Texas.*—Vance, Ex parte, 42 Tex. Cr. App. 619, 62 S. W. 568 (1901).

But see:

*Georgia.*—Cosgrove v. City Council of Augusta, 103 Ga. 835, 31 S. E. 445, 68 Am. St. Rep. 149, 42 L. R. A. 711 (1898).

*Michigan.*—Napman v. People, 19 Mich. 352 (1869).

are valid or not depends upon whether it is consistent with the general duty of the carrier or not to so arrange matters.

**§ 485. Hack service: radical view.**

On the other hand, the position that a railroad may not admit favored hackmen to solicit business upon the station grounds and exclude other hackmen from equal privileges is held in many cases. The argument for this view is stated very clearly in State v. Reed [1] by Mr. Chief Justice Woods: "The question is one that affects the interests of the public. The upholding of the grant of this exclusive privilege would prevent competition between rival carriers of passengers, create a monopoly in the privileged hackmen, and might produce inconvenience and loss to persons traveling over the railroad, or those having freights transported over it, in cases of exclusion of drays and wagons from its grounds, other than those owned by the person having the exclusive right to enter the railroad's depot grounds. To concede the right claimed by the railroad in the present case would be, in effect, to confer upon the railroad company the control of the transportation of passengers beyond its own lines, and to create a monopoly of such business, not granted by its charter, and against the interests of the public." [2]

[1] 76 Miss. 211, 24 So. 308, 71 Am. St. Rep. 528, 43 L. R. A. 134 (1898).

[2] To the same effect are:

*Florida.*—Indian River S. B. Co. v. East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

*Illinois.*—Pennsylvania Co. v. Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223 (1899).

*Indiana.*—Indianapolis U. Ry. v. Dohn, 153 Ind. 10, 53 N. E. 937, 74 Am. St. Rep. 274, 45 L. R. A. 427 (1899).

*Kentucky.*—McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15 (1892).

*Michigan.*—Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194, 47 N. W. 667, 22 Am. St. Rep. 693, 10 L. R. A. 819 (1890).

*Missouri.*—Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106 (1890).

*Montana.*—Montana U. Ry. Co. v. Langlois, 9 Mont. 419, 24 Pac.

**§ 486. Argument therefor.**

There seems to be a violation of the duty owed by the carrier to the passenger to permit free egress by these special privileges at the station which prevent the passenger from having equal access to all who wish to put themselves at his disposal. The right of the passenger to have ingress to the station by any carriage that he chooses to employ nobody dares to deny; it is very hard to see any essential difference from the obligation to give egress without discrimination. Moreover, to allow the grant of exclusive privilege permits the exploitation of the passenger by this monopoly; for monopoly price is always higher than competitive price. This may be shown by the fact that the favored lines are always willing to pay roundly for the exclusive privilege, even when maximum fares are fixed by local ordinance.

**§ 487. Access to connecting steamboats.**

An analogous question is raised when a railroad having a terminus upon a wharf in a navigable stream, enters into some arrangement with one steamboat line whereby it may have exclusive access to the wharf. In the Indian River Steamboat Co. v. East Coast Transportation Company,[1] a scheme to give an exclusive right was held opposed to public duty. Mr. Justice Mabry in the opinion of the court said in one place: "The real question presented here is, can complainant corporation, engaged in carrying freight and passengers on the Indian River by means of steamboats, rent from a railroad common carrier its dock on said river, on which its track and terminal facilities are located, and exclude others from landing at said terminal point for the purpose of receiving freight and passengers to and from said common carrier? This question,

209, 18 Am. St. Rep. 745, 8 L. R. A. 753 (1890).

[1] 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

we think, must be answered in the negative. If it be competent to sustain such a contract, the common carrier can select one connecting line of boats, and exclude all others from doing business with it. Such a doctrine would lead to the legalizing of a monopoly, and the sanction of an unfair and unjust preference between connecting and competing lines of transportation. We do not understand that a common carrier ever had such power as this." [1]

**§ 488. No access owed except at wharf stations.**

It should be said, however, that as no access or egress is owed except at established stations by a railroad to its patrons, the only legal wrong in such discrimination against connecting steamboats at terminal wharves will be at such wharves as are regular stations. This was the deciding point in the final decision in Ilwaco Railway and Navigation Company v. Oregon Short Line Railway Company [2] where the Circuit Court of Appeals held that a transportation company operating a railway and a line of steamboats connecting at the company's wharf need not permit the steamboats of a competitor to land at such wharf. Mr. Justice McKenna pointed this out: "We may add that the wharf does not seem to be a public station. It is a convenience, only, in connecting its railroads and boats; the general station being at Ilwaco, where ample facilities exist." [3]

[1] There is other authority to the same effect: Macon, D. & S. R. R. Co. v. Graham & Ward, 117 Ga. 55, 43 S. E. 1000 (1903).

[2] 57 Fed. 673, 15 U. S. App. 173, 6 C. C. A. 495 (1893), overruling 51 Fed. 611 (1892).

[3] See Louisville & N. R. R. Co. v. West Coast N. S. Co., 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. 745 (1905), overruling 121 Fed. 645 (1903), where it was held that if a railroad provided adequate wharfage facilities, it might at a particular wharf exclude all but one line. Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 52 U. S. App. 732, 30 C. C. A. 142 (1898), *accord*. But see The Davidson, 122 Fed. 1006 (1903).

There are two New York cases on this point. One holds that a rail-

## § 489. Treatment of baggage transfer men.

This question, whether access to the station may be granted exclusively to one baggage-transfer line and altogether denied to others, is another case under the general problem. There is upon this issue, therefore, the same bitter controversy conducted along the same lines with the same arguments advanced with the result that some jurisdictions will permit the exclusion of all but the favored line, while others allow equal access to all. On one side it may be said, as before, that there is no direct duty owed by the company to the baggage-transfer lines or any of them; and that, therefore, the railroad may make any discriminations that it pleases. For, as is pointed out in the principal cases cited below if there is no public duty in the matter, a public service company may bestow its favors as it pleases; and to many courts it seems that the railways may deal as they please with the baggage-transfer people.[1] On the other hand, in many other jurisdictions it would certainly be held that the general duty owed by the railway company to its passengers to allow them free egress from its station, involved the duty to allow them free access within the station to those who

road which permits one steamboat company to use a wharf upon which its tracks terminate is not bound to permit another line to do so. Alexandria Bay Sb. Co. v. New York C. & H. R. R. R. Co., 45 N. Y. Supp. 1091, 18 N. Y. App. Div. 527 (1897). In the other it was held that where a special franchise to maintain a public wharf was granted the rule was otherwise. Thousand Island Sb. Co. v. Visgar, 86 N. Y. App. Div. 126, 83 N. Y. Supp. 325 (1903).

[1] Such is the doctrine of the following cases, for example:

*Georgia.*—Kates v. Atlanta Bag. Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 (1899). See further Hart v. Atlanta Terminal Co., 128 Ga. 754, 58 S. E. 452 (1908).

*Massachusetts.*—Old Colony R. R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661, B. & W. 166 (1888).

*New Hampshire.*—Hedding v. Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811 (1903).

*Virginia.*—Norfolk & W. Ry. v. Old Dominion Bag. Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722 (1901).

might wish to put themselves at their disposal to aid them in getting their belongings away.[1]

**§ 490. Rights of competing draymen.**

On analogous principles to those discussed in regard to baggage transfer it would seem that the railroad may not permit certain draymen to have access to its freight houses to cart goods to consignees, and refuse all access to other carters. For example, if a consignee sends to a freight house for his freight by a drayman of his own selection, it should be clear that the railroad would act contrary to its duty if it refused such a drayman access to the goods. On the other hand, it may be granted that if the carrier chooses to extend its route in effect by undertaking personal delivery of freight to the consignee at his address, it may do this by its own carts and men, and need not employ in that service all who wish to engage in it. But whether if it offers delivery beyond its own route to its patrons, and to that end enters into an exclusive contract with one line of drays to perform this service, the owners of other drays may complain if they are excluded from offering their services to shippers in this behalf, is the question of the duties of a common carrier in dealing with a dependent service presented in still another form. The Federal courts, as might be expected, see nothing wrong in such an arrangement. The point is thus made in St. Louis Drayage Company v. Louisville and Nashville Railroad Company [2] where the facts involved the issue

[1] Such is the doctrine of the following cases, for example:

*Indiana.*—Indianapolis U. Ry. Co. v. Dohn, 153 Ind. 10, 53 N. E. 937, 74 Am. St. Rep. 274, 45 L. R. A. 427 (1899).

*Kentucky.*—Palmer Transfer Co. v. Anderson, 131 Ky. 217, 115 S. W. 182, 19 L. R. A. (N. S.) 756 (1909).

*Michigan.*—Kalamazoo Hack & Bus Co. v. Sootsuma, 84 Mich. 194, 47 N. W. 667, 22 Am. St. Rep. 693, 10 L. R. A. 819 (1890).

*Missouri.*—Cravens v. Rodgers, 101 Mo. 247, 14 S. W. 106 (1890).

[2] 65 Fed. 39 (1894).

which has just been raised. In that case Mr. Justice Phillips said: "It was essential that, in selecting a company for the transfer of its freights between St. Louis and East St. Louis, it should secure one fully equipped for doing the business,—solvent and reliable. It could not afford to take chances in so grave a matter. It might be unsafe to trust to the caprice of competing transfer companies, or to sporadic rivalries." [1]

**§ 491. Arrangements with stock yards.**

The relative positions of the railroads and the stock yards will be discussed later at greater length. It will then be seen that although the decision at first was otherwise it now seems to be held that there is no duty owed to the owner of cattle to make special delivery of them at any place along the line that he wishes. Consequently it is held that the railroad may designate certain points of delivery reasonably convenient, as it may of other freight which it has undertaken to carry. Upon this basis the courts have been willing to permit the railroad to designate one of several stock yards as its cattle station in effect, where it will deliver cattle consigned to that point and have accordingly justified it in refusing to deliver at other stock yards. This was well enough so long as the courts held strictly as they once did [2] that no charge could be made under such circumstances against the shipments for yardage if the consignee was ready to take the cattle away. But under the latest decisions the courts have permitted the stock yards company to make an additional charge,

[1] A drayage company employed by one carrier to deliver goods in transit to another carrier is its own dependent service—not an independent connecting carrier. Hooper v. Chicago & N. W. R. R. Co., 27 Wis. 81, 9 Am. Rep. 439 (1870).

[2] Covington S. Y. Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. 461 (1891). See also Butchers' & D. S. Y. Co. v. Louisville & N. R. R. Co., 67 Fed. 35, 14 C. C. A. 290 (1895); Coe v. Louisville & N. R. R. Co., 3 Fed. 775 (1880), is practically overruled on this point.

considering it to be a connecting service.[1] It would seem, therefore, that there is danger in the present situation that the railroad will not fulfill its duty. And should it persist in handing its patrons over to the particular stock yards, with which it has exclusive arrangements, the danger of exploitation which has been discussed earlier in this chapter will sometime become apparent.

**§ 492. Contracts with grain elevators.**

As to grain elevators the rule is practically established that the railroad must deliver at their private siding to all of them that are along its route. Grain in bulk is a peculiar kind of freight, which as a commercial matter requires special delivery. And as this is a duty owed by the railroad to its patrons, it would not be legal for it to make a discrimination in favor of one grain elevator requiring its patrons to receive grain consigned to them through it and pay to its proprietor his fixed charge.[2] Against such a possibility more than one court has urgently protested. "May such railroad companies, in like manner, discriminate between grain elevators in the same place,—constitute one elevator its depot for the delivery of grain, and force competing interests to receive from and transfer the grain consigned to them through such selected and favored channel? If railroad corporations possess such right, they can destroy a refractory manufacturer, exterminate, or very materially cripple competition, and

[1] Interstate Comm. Comm. v. Chicago, B. & Q. R. R. Co., 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. 824 (1902). See also Central S. Y. Co. v. Louisville & N. R. R. Co., 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339 (1904). See further Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. 246 (1909).

[2] *Illinois.*—Chicago & Northwestern Ry. Co. v. People of Illinois, 56 Ill. 365 (1870).

*Iowa.*—Richmond v. Dubuque & S. C. R. R. Co., 26 Iowa, 191 (1868).

*Minnesota.*—State v. Chicago, M. & St. P. Ry. Co., 36 Minn. 402, 31 N. W. 365 (1887).

*Nebraska.*—Roby v. State ex rel., 76 Neb. 450, 107 N. W. 766 (1906).

in large measure monopolize and control these several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive." [1]

*Topic C. Public Services in General*

**§ 493. Exclusive arrangements by innkeepers.**

The same problems present themselves to a limited extent in connection with the hotel keeper's business, and it is submitted that they should be solved upon the principles that have been defended. Thus as there is a duty to incoming or outgoing guests, it would seem that innkeepers should give the proprietors of competing carriage services equal access to guests. An innkeeper may not of course refuse admission to the grounds to guests who come in any sort of vehicle by whomsoever owned; and by the view here defended they ought to give equal privileges to common carriers who wish to take departing guests. In a leading case in New Hampshire [2] it was decided that proprietors of stagecoaches should be given equal facilities within the inn. The court held that the defendant had clearly a right to establish a line of stagecoaches, and to go to the plaintiff's inn with travelers; and he might of course lawfully enter it for the purpose of leaving their baggage and receiving his fare. "And we are of opinion that, so long as others were permitted to do the same, the defendant had an equal and lawful right, notwithstanding any prohibition by the plaintiff, to enter the plaintiff's inn for the purpose of tendering his coach for the use of travelers, and soliciting them to take passage with him; and for that purpose to go into the common public rooms of the inn, where guests

[1] Coe v. Louisville & N. R. R. Co., 3 Fed. 775 (1880).
See generally § 816, *infra*.

[2] Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837).

were usually placed to await the departure of the stages, although he was not requested by such guests; provided there was a reasonable expectation that passengers might be there, and he came at a suitable time, in a proper manner, demeaned himself peaceably, and remained no longer than was necessary, and was doing no injury to the plaintiff." [1]

**§ 494. Equal facilities for ticker service.**

It seems to be held that the stock exchanges are so affected with a public interest as to be under a duty to give the public access to their quotations. Having devoted these quotations to public use they may be bound to see that they are furnished to all concerned without discrimination.[2] And yet according to the decision [3] on this point the stock exchanges may make an exclusive contract with one telegraph service to handle its news. "Even assuming that the New York Stock Exchange is under an obligation to make public the prices at which stocks are sold on its floor, it has a right to control absolutely the channel through which such quotations shall be given out. It may, therefore, select one 'Ticker' Company, and give to it all the privileges of connecting news upon its floor and exclude all others."

**§ 495. Canal company giving monopoly of towage.**

The general issue was involved in a very recent case [4]

[1] In a recent New York case a clause in a contract between a telephone company and an innkeeper by which it was provided that no other telephone company should be permitted to install stations in the hotel was held void as against public policy. Central New York Tel. & Tel. Co. v. Averill, 55 N. Y. Misc. 346, 105 N. Y. Supp. 378 (1907).

[2] See New York Stock Exchange v. Chicago Board of Trade, 127 Ill. 153, 19 N. E. 855 (1889).

See the language in National Telegraph N. Co. v. Western Union Telegraph Co., 119 Fed. 294, 55 C. C. A. 198 (1902).

[3] Wilson v. The Telegram Co., 18 N. Y. State Rep. 78, 3 N. Y. Supp. 633 (1888), *semble*.

[4] Chesapeake & D. Canal Co. v.

in which among other regulations of the Chesapeake and Delaware Canal one prohibiting barges not the property of the owner of the tug from being towed through the canal by a tugboat hired for the purpose (virtually requiring such barges to be turned over to a particular towing company to be taken through) was held void,—the United States District Judge saying: "We concur in the opinion of the court below that this regulation is not reasonable or necessary, and therefore beyond the powers of the canal company. In justification of this regulation the canal company claims that in order to accommodate the absolute necessities of three-fourths of the commerce passing through the canal, it was necessary to have a towing company whose charges shall be low, and which will be ready at all times to take barges through without delay, and that it found that, in order to get such service, it was necessary to secure to such towing service a sufficient amount of business at the low prices charged to pay the expenses of the necessary equipment. We find nothing in the charter of the company which justifies it in preventing a tug of proper dimensions from towing through the canal any barge of suitable dimensions and equipment upon the payment of the lawful toll. The canal is a public highway and the public has the right to the free use of it provided the legal tolls are paid." [1]

## § 496. Arrangements for sprinkling service.

One of the most interesting cases upon the whole subject is the recent case of Louisville Water Company v. Wiemer,[2] in which it was held that the elaborate regula-

Gring, 159 Fed. 662, 86 C. C. A. 530 (1908).

[1] In Buffalo Bayou Ship Channel v. Milby & Dow, 63 Tex. 492, 51 Am. Rep. 668 (1885), it was held that the proprietors of a canal could not refuse to let a vessel pass in tow on the ground that the owners of the towboat owed the canal company for unpaid tolls.

[2] 130 Fed. 257, 64 C. C. A. 503 (1904).

tions of a water company requiring persons engaged in sprinkling of streets to obtain a license from the company, and providing that more than one license would not be granted covering the same street or part of a street, which should be granted to the applicant having the largest list of petitioning owners of abutting property were entirely reasonable. The course of reasoning followed is well worth study. "Certainly it cannot be said that there would be any propriety in granting licenses to any and all comers who should demand it to do the same thing. In this particular service it is obvious that this would lead to chaos, would embarrass the service to the public, and would be inconvenient and prejudicial to the company. We see nothing, therefore, that could be injurious to any lawful right of others in restricting the grant of the license to one person for a definite locality, so long as that person accomplished the duty of the company to the public in a proper way. The concession of this place to the one who could bring the largest approval of those of the other party who were most interested, seems fair. We are therefore unable to find any satisfactory ground for holding the rule adopted by the appellant for determining to what person the license should be granted to be void as either beyond its powers or unreasonable." [1] It is not beyond the range of probability that this whole problem might at some time long distant be worked out along the lines of this decision, avoiding the waste of duplication of service by granting an exclusive right to the concern which will make the best terms with the public.

### § 497. Telephone installation in public premises.

A most interesting modern instance of this general problem has come up in several ways in late years by

[1] Callery v. Waterworks Co., 35 La. Ann. 798 (1883), also allows a water company to make exclusive arrangements with one sprinkler concern.

reason of the prevalent use of the telephone in all affairs. Where there are several telephone systems in a community, it has been desired at various times to have installed in public premises such as railroad stations and hotel lobbies the various telephone systems which serve the community. In a Canadian case [1] it was held by a divided Commission that a railroad might make an exclusive arrangement with one telephone system, the majority judge concluding "so far as I can discover the general interests of the public are not prejudicially affected." But in a recent New York case [2] it was held that an exclusive arrangement made by a hotel keeper with one telephone system was against public policy as the judge saw it. "Telephonic communication has become a necessity in commerce and business; and, while there are disadvantages in two systems in one territory, a monopoly of such a common necessity, with the lessened incentive to good service and the best equipment which follows, is a greater evil."

*Topic D. No Public Duty Involved*

**§ 498. Special concessions when no public duty involved.** It is obvious that the outside limits of the public duty which the principal service owes in respect to dependent services have now been reached. So long as there was a question of the right of the public in respect to their service a public duty seems to be involved; within these limits there should not be even opportunity for exploita-

[1] The Telephone Case, 3 Can. Ry. Cas. 205 (1904). In People v. Western Union Telegraph Co., 166 Ill. 15, 46 N. E. 731 (1897) it was held that a telegraph company was not obliged to let a telephone company put an instrument in the office although another telephone company was in.

[2] Central New York Tel. & Tel. Co. v. Averill, 55 N. Y. Misc. 346, 105 N. Y. Supp. 378 (1907). In Idaho Independent Telephone Co. v. Oregon Short Line R. R. Co., 8 Idaho, 175, 67 Pac. 318 (1901), the question was left undecided.

tion, but once outside public duty the principal company should be free to carry on its own business in its own way. A carrier, like all others, may bestow favor where he chooses. "Rights, not favors, are the subject of demand by all parties indiscriminately. The incidental benefit arising from the transaction of such business as may be done on board of a boat or on a car, belongs to the carrier, and he can allow the privilege to one and exclude from it another, at his pleasure. A steamboat company or a railroad company, may well allow an individual to open a restaurant or a bar on their conveyance, or to do the business of boot blacking, or of peddling books and papers. This individual is under their control, subject to their regulation, and the business interferes in no respect with the orderly management of the vehicle." [1] It is because it owes no duty to passengers to see to the provision of flowers, magazines, cigars and souvenirs, that a railroad may grant exclusive privileges for the sale of these articles upon its trains, and that it may grant in a station exclusive rights to barbers and bootblacks and to advertisers and solicitors.[2]

**§ 499. Special concessions for private business.**

Likewise in respect to private services of all sorts, the innkeeper owes no duty to his guests and may therefore enter into such exclusive arrangements as he pleases with

[1] The D. R. Martin, 11 Blatch. 233 (1873). The same parties were involved in Barney v. Oyster Bay & H. Steamboat Co., 67 N. Y. 301 (1876), with the same result.

[2] As it owes no public duty in the premises the common carrier in its special contracts with train boys may stipulate against liability for personal injuries. See:

*Connecticut.*—Griswold, Adm., v. New York & N. E. R. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115 (1885).

*Illinois.*—Chicago, R. I. & P. R. R. Co. v. Moran, 117 Ill. App. 42 (1904).

*Louisiana.*—Higgins v. New Orleans, M. & C. R. R. Co., 28 La. Ann. 133 (1876).

*Missouri.*—Padgitt v. Citizens' Ry. Co., 159 Mo. 143, 60 S. W. 121, 52 L. R. A. 854, 81 Am. St. Rep. 347 (1900).

those who wish to carry on such businesses with guests. In a leading case in North Carolina [1] it was held that a proprietor of a hotel could exclude from his premises a drummer for a livery stable, as he had entered into an exclusive arrangement with one livery stable which had an office there. "An innkeeper has unquestionable right to establish a news stand or barber's shop in his hotel, and to exclude persons who come for the purpose of vending newspapers, or books, or soliciting employment as barbers; and in order to render his business more lucrative he may establish a laundry or a livery stable in connection with his hotel, or contract with a proprietor of a livery stable in the vicinity, to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses, from dealing with the patrons of the public house." It should be noted in this connection that all of the incidental services that have been mentioned under this topic are private in character. This is a significant fact, for it shows that none of them are so necessary to the patrons of the principal service as to be affected with a public interest.[2]

**§ 500. Whether service provided is necessary.**

The point has been raised a few times whether there is a duty in respect to the provision of food for passengers. If there is a public duty it is to the traveling passenger; and it can hardly be denied that those who carry pas-

[1] State v. Steele, 106 N. C. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. Rep. 573 (1890). See also as to the granting of similar concessions in common carriage the language used in Memphis News Publishing Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150 (1903).

[2] The cases are plain that agents in general may be prevented from soliciting on the premises:

*United States.*—Jenkes v. Coleman, 2 Sumner, 221, Fed. Cas. No. 7258 (1835).

*Louisiana.*—Ford v. East Louisiana R. Co., 110 La. 414, 34 So. 585 (1903).

sengers over long distances owe them the duty to make provision for food for them. The rule is thus stated in Peniston v. Chicago, St. Louis Railroad Company,[1] by Mr. Justice Poche: "In conveying passengers through long journeys, such as from Chicago to New Orleans, at great speed and with rapidity, a common carrier is required by humanity, as well as by law, to provide its passengers with easy modes and to allow them reasonable time for the purpose of sustaining life by means of food and necessary refreshments." But it seems to be the law that the railroad company fulfills its obligation in this respect by making an exclusive contract with one concern.[2] However there is clearly no duty to provide passengers with refreshments between meals.[3] "The business of selling lunches to passengers or of soliciting from them orders for the same is not one which every citizen has the right to engage in upon the tracks and premises of a railway company, and, consequently, those who do engage in it and carry it on must depend upon the company for the privilege." [4]

**§ 501. Additional favors beyond obligation.**

Even when there is a duty in the premises to give proper accommodation to competing services, the obligation does not go beyond reasonable facilities. Thus although there is conflict of authority as to whether a railroad company is bound to give competing baggage transfer companies necessary privileges, there seems to be no doubt of its

[1] 34 La. Ann. 777, 44 Am. Rep. 444 (1882).

[2] Kelly v. C., M. & St. P. Ry. Co., 93 Iowa, 436, 61 N. W. 957 (1895), and Perth General Station Committee v. Ross A. C. 479 (1897), both permit exclusive contracts with eating houses.

[3] The quotation is from Fluker v. Georgia R. R. & Banking Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328 (1888).

[4] Smallman v. Whilter, 87 Ill. 545, 29 Am. Rep. 76 (1877), *accord.*

right to permit certain transfer men to enter upon the trains before reaching the station, while refusing this favor to others; or to permit one man to check baggage from the house of the traveler, while refusing this permission to others.[1] Likewise certain parties may be given office room upon public premises, this favor being refused others. Thus in Audenried v. Philadelphia & Reading Railroad Company,[2] the question was as to the right of the defendant company to so parcel or divide its wharf among other coal dealers as to exclude the complainant therefrom. After expressing great doubt as to whether the defendant, under its charter, was bound to provide wharf accommodations to any of the coal dealers in question, or was a trustee to any extent for them, the court adds: "Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others. This was not transportation, but wharfage, the nature of which requires exclusive possession temporarily."

[1] *Georgia.*—Kates v. Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431 (1899).

*Texas.*—Lewis v. Weatherford, M., W. & N. W. Ry. Co., 36 Tex. Civ. App. 48, 81 S. W. 111 (1904).

[2] Audenried v. Phila. & Reading R. R. Co., 68 Pa. St. 370, 8 Am. Rep. 195 (1871).

See also State of Louisiana v. Southern Pacific Ry. Co., 52 La. Ann. 1822, 28 So. 372 (1900).

A baggage transfer company has a right to conduct in the baggage room as an independent private enterprise a special office where it receives and keeps on storage parcels of prospective passengers until they are called for by the passenger after he has obtained his ticket or other evidence of the right of transportation, and then, upon exhibition of the same, to act as his agent to check the parcel as baggage to be forwarded to the point designed by the ticket. Atlanta Terminal Co. v. American Trans. Co., 125 Ga. 678, 54 S. E. 711 (1906).

A lease by a railroad company of its land between its tracks and a river held and treated by it as part of its depot grounds is not for a legitimate purpose but constitutes a discrimination between shippers, its effect being to give one company engaged in floating ties down the river for shipment by the railroad an advantage over others in the

**§ 502. Exclusive contracts in private capacity.**

This is particularly plain where the business to which the exclusive contract relates is plainly private. Thus where a corporation manufacturing gas for use by inhabitants of a certain city necessarily accumulated coke in large quantities, and, not being engaged in the selling of fuel, contracted with a coal company to deliver to it all its accumulations of coke, and not to dispose of the same to any other person or company, it was held [1] that the agreement to sell its entire output to the coal company was not unlawful, on the ground that unless there is a public duty in the premises the company may do as it pleases. So an electric company may maintain a wiring department which may make such arrangements as it pleases with those who chose to patronize it. But it must not discriminate between those of its customers who patronize its wiring department and those who do not.[2]

**§ 503. Private activities often held ultra vires.**

This is of course subject to the fundamental rule of corporation law which forbids a corporation from engaging in an *ultra vires* business, and a public service company cannot usually get far into a purely private business without coming into conflict with this law.[3] However, the incidental powers of such companies may often fairly be measured by the universal custom prevailing in the given business, but where there is no such common prac-

same business, in getting them to the cars. Hobart-Lee Tie Co. v. Stone (Mo. App.), 117 S. W. 604 (1909).

[1] State v. St. Paul Gaslight Co., 92 Minn. 467, 100 N. W. 216 (1904).

[2] Snell v. Clinton Electric Light Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284 (1902).

[3] See People ex rel. v. Illinois Central R. R. Co., 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181 (1908), railroad has no implied power to operate grain elevators. And Attorney General v. Great Northern R. R. Co., 29 L. J. Eq. (N. S.) 794 (1860), railroad has no implied power to work coal mines.

tice the case is difficult. Thus it is at present undecided what power a transportation company has to make arrangements for granting advertising privileges, although it would generally be agreed that if it has corporate power to make such contracts there is no reason in the public service law why it should not make exclusive arrangements.[1]

[1] In New York v. Interborough Rapid Tr. Co., 53 N. Y. Misc. 126, 104 N. Y. Supp. 157 (1907), and in Burns v. St. Paul City Ry. Co., 101 Minn. 363, 112 N. W. 412, 12 L. R. A. (N. S.) 757 (1907), it was thought that such arrangements were within the implied powers of the transportation corporation and were at all events not in conflict with any of its public duties. In National Car Advertising Co. v. Louisville & N. R. R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010 (1909), and in Pittsburg & B. Traction Co. v. Seidell, 6 Pa. Dist. R. 414 (1896), it was thought that any advertising arrangements by transportation companies were *ultra vires*, if not indeed contrary to its public duty. See also Fifth Ave. Coach Co. v. New York, 126 N. Y. App. Div. 657, 110 N. Y. Supp. 1037 (1908), referring to Pears v. Manhattan Ry. Co., N. Y. Law Jour., Feb. 3, 1900, both expressing the opinion that such arrangements were *ultra vires*.

# CHAPTER XV

## OBLIGATION AS TO CONNECTING SERVICES

§ 510. Public duty as to connecting services.

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**§ 510. Public duty as to connecting services.**

The law relating to connecting services is quite voluminous, but upon the matter with which the present chapter is principally concerned there is as yet very little authority. There are, for example, many cases as to the respective liabilities of connecting carriers, but very few as to the duty of an unwilling carrier to participate in connecting carriage. The problem cannot be dismissed by saying that for a carrier to make arrangements with one connection while refusing to do the same with another is illegal discrimination, for that this is true only to the extent that public duty is involved; so that the fundamental question is, what is the extent of the duty of a railroad in dealing with connecting railroads. It may not refuse altogether to have dealings with them, to accept goods from them, for example. Obviously this will not do; it is the duty of the railroad as a common carrier to accept from any person tendering goods. On the other hand, it can hardly be said that the railroad must accord to all railroads every special privilege that it gives one railroad in a joint traffic agreement; for what it does for one as a favor, another cannot demand as a right. The truth of this matter must therefore lie between two extremes in some practicable compromise that will meet the necessities of the public while recognizing, as far as may be, the independence of the carriers.

*Topic A. Basis on Which Through Service is Undertaken*

**§ 511. Through service may be undertaken.**

The rule is generally recognized that the obligation of a carrier to transport goods is limited to the route over

which it professes service. But although a carrier therefore cannot be called upon to undertake the transportation of goods beyond its own route, it may voluntarily assume through transportation, relying upon its connections as agencies to fulfil its undertaking.[1] For while a railroad cannot be compelled to accept and to agree to carry goods to points beyond its own line, yet it may do so. And if the carrier expressly or impliedly contracts to carry from the consignor to the consignee it will be liable as a common carrier for the whole distance. Another example is the acceptance of a telegram by the initial company upon the basis that it will be responsible for its delivery at its destination, although that is a point upon the lines of another company.[2] These are but two instances (although by far the most prominent) of the possibility much described later, that although a public service company may not be compelled to go outside its

[1] *United States.*—Missouri, K. & T. Ry. Co. v. McCann, 174 U. S. 580, 43 L. ed. 1093, 19 S. Ct. 755 (1898).

*California.*—Colfax Mountain Fruit Co. v. Southern Pac. Ry. Co., 46 Pac. 668 (1896), 118 Cal, 648, 50 Pac. 775, 40 L. R. A. 78 (1897).

*Georgia.*—Central R. R. Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37 (1893).

*Illinois.*—Toledo, W. & W. Ry. Co. v. Lockhart, 71 Ill. 627 (1874).

*Indiana.*—Chicago, St. L. & P. R. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

*Kentucky.*—Farley v. Laary, 107 Ky. 523, 54 S. W. 840, 47 L. R. A. 383 (1900).

*Maine.*—Perkins v. Portland, S. & P. R. R. Co., 47 Me. 573, 74 Am. Dec. 507 (1859).

*Massachusetts.*—Hill Mfg. Co. v. Boston & Lowell R. R. Co., 104 Mass. 122, 6 Am. Rep. 202 (1870).

*Michigan.*—Johnson v. Toledo, S. & M. Ry. Co., 133 Mich. 596, 95 N. W. 724 (1903).

*Minnesota.*—Stewart v. Erie & W. Transp. Co., 17 Minn. 372 (1871).

*Pennsylvania.*—Baltimore & P. Steamboat Co. v. Brown, 54 Pa. St. 77 (1867).

*Wisconsin.*—Hansen v. Flint & P. M. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791 (1889).

[2] *Texas.*—Jones v. Roach, 21 Tex. Civ. App. 301, 51 S. W. 549 (1899).

*Canada.*—Stevenson v. Montreal Telegraph Co., 16 Upp. Can. Q. B. 530 (1858).

profession it may voluntarily undertake such service upon a public basis.

**§ 512. English presumption of through carriage.**

In England and in some of the United States, the presumption is that when goods are taken marked for a point beyond the route of the initial carrier, through service is assumed.[1] In the leading English case, Muschamp v. Lancaster and Preston Junction Railway Company [2] it was held that such acceptance of goods so marked in itself made out a *prima facie* case from which the jury were justified in finding the accepting carrier liable as such even for a loss occurring beyond its own line. Lord Abinger thus began his discussion of the case: "The simple question in this case is, whether the learned judge misdirected the jury in telling them that if the case were stripped of all other circumstances beyond the mere fact of knowledge by the party that the defendants were carriers only from Lancaster to Preston, and if, under such circumstances, they accepted a parcel to be carried on to a more distant place, they are liable for the loss of it, this being evidence whence the jury might infer that they undertook to carry it in safety to that place. I think that

[1] *Alabama.*—See Lotspeich v. Central R. Co., 73 Ala. 306 (1882).

*Arkansas.*—Kansas City, F. S. & M. R. R. Co. v. Washington, 74 Ark. 9, 85 S. W. 406 (1905).

*Georgia.*—Mosher v. Southern Exp. Co., 38 Ga. 37 (1868).

*Illinois.*—Wabash R. R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 1041 (1906).

*Iowa.*—Beard v. St. Louis, A. & T. H. Ry. Co., 79 Iowa. 527 (1890).

*New Hampshire.*—Nashua Lock Co. v. Worcester & N. R. R. Co., 48 N. H. 339, 2 Am. Rep. 242 (1869).

*Ohio.*—Baltimore & Ohio R. R. Co. v. Campbell, 36 Ohio St. 647, 38 Am. Rep. 617 (1881).

*Tennessee.*—See Merchants' Dispatch Trans. Co. v. Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847 (1887).

*Washington.*—Allen & G. R. Co. v. Can. Pac. Ry. Co., 42 Wash. 64, 84 Pac. 620 (1906).

*Wisconsin.*—See Tolman v. Abbot, 78 Wis. 192, 47 N. W. 264 (1890).

[2] 8 M. & W. 421, 5 Jur. 656 (1841).

in this proposition there was no misdirection." Later on in his opinion Lord Abinger defends this rule on policy saying that otherwise the shipper will not know to whom to look.

**§ 513. American presumption of successive service.**

By the weight of American authority, however, the natural presumption prevails that each carrier is liable only for carriage over his own route unless he has committed himself clearly to through transportation.[1] The

[1] *United States.*—Insurance Co. v. Railroad Co., 104 U. S. 146, 26 L. ed. 679 (1881).

*California.*—Cavallaro v. Texas & Pac. Ry. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94 (1895).

*Connecticut.*—Naugatuck R. R. Co. v. Waterbury Button Co., 24 Conn. 468 (1856).

*Delaware.*—Truax v. Philadelphia P. W. & B. R. R. Co., 3 Houst. 233 (1865).

*Florida.*—Savannah, F. & W. Ry. Co. v. Harris, 26 Fla. 148, 7 So. 544, 23 Am. St. Rep. 551 (1890).

*Indiana.*—Pittsburg, C. & St. L. R. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682 (1878).

*Kentucky.*—Thomas v. Frankfort & C. Ry. Co., 25 Ky. L. Rep. 1051, 76 S. W. 1093 (1903).

*Kansas.*—Berg v. A., T. & S. F. R. R. Co., 30 Kan. 561, 2 Pac. 639 (1883).

*Maine.*—Perkins v. Portland S. & P. R. R. Co., 47 Me. 573, 74 Am. Dec. 507 (1859).

*Louisiana.*—Vincent v. Yazoo & M. V. R. Co., 114 La. 1021, 38 So. 816 (1905).

*Maryland.*—Hoffman v. Cumberland R. R. Co., 85 Md. 391 (1897).

*Michigan.*—Marquette, H. & O. R. R. Co. v. Kirkwood, 45 Mich. 51, 40 Am. Rep. 453 (1880).

*Minnesota.*—Ortt v. Minneapolis & St. L. Ry. Co., 36 Minn. 396, 31 N. W. 519 (1887).

*Mississippi.*—Illinois Cent. R. R. Co. v. Kerr, 68 Miss. 14, 8 So. 330 (1890).

*Missouri.*—Crouch v. Louisville & Nashville R. R. Co., 42 Mo. App. 248 (1890).

*Nebraska.*—Chicago, B. & Q. R. Co. v. Gustin, 35 Neb. 86, 52 N. W. 844 (1892).

*North Carolina.*—Knott v. Raleigh & G. R. R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321 (1887).

*New York.*—Condit v. Grand Trunk R. R. Co., 54 N. Y. 500 (1873).

*Pennsylvania.*—Pennsylvania R. R. Co. v. Berry, 68 Pa. St. 272 (1871).

*Oregon.*—Toffe v. Oregon R. R. Co., 41 Oreg. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187 (1902).

*Rhode Island.*—Knight v. Providence & W. R. R. Co., 13 R. I. 572, 43 Am. Rep. 46 (1882).

*South Carolina.*—Dunbar v. Port

mere fact that the original carrier has accepted goods marked for a point off his own route is not sufficient to overcome this presumption. In one of the leading American cases, Nutting v. Connecticut River Railroad Co.,[1] Mr. Justice Metcalf said: "What, then, is the obligation imposed on them by law, in the absence of any special contract by them, when they receive goods at their depot in Northampton, which are marked with the names of the consignees in the city of New York? In our judgment that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers, to be forwarded towards their ultimate destination. This the defendants did, in the present case, and in so doing performed their full legal duty. If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability." It will be noticed that to this court the policy seems to be for the protection of the carrier from unreasonable liability.

### § 514. What constitutes connecting service.

It would not seem that it would be a difficult question to determine whether a particular case really involves connecting service with its accompanying obligations; and yet certain decisions will show that this problem may be very difficult. Thus a transfer company employed by one carrier to transfer the goods to the next carrier,[2] or

Royal & A. Ry. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860 (1891).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Baird, 75 Tex. 256, 12 S. W. 530, (1889).

*Vermont.*—Hadd v. United States Express Co., 52 Vt. 335, 36 Am. Rep. 757 (1880).

*Virginia.*—Virginia C. & I. Co. v. Louisville & N. R. R. Co., 98 Va. 776, 37 S. E. 310 (1900).

[1] 1 Gray, 502 (1854).

[2] *Nebraska.*—Missouri Pac. R. Co. v. Young, 25 Neb. 651, 41 N. W. 646 (1889).

*Wisconsin.*—Hooper v. Chicago & N. W. R. R. Co., 27 Wis. 81, 9 Am. Rep. 439 (1870).

a cartage company employed by the last carrier to deliver the goods to the consignee,[1] or a stock yard to which a railroad delivers cattle,[2] or a telephone used to deliver a telegram,[3] or a hackman employed by a passenger at a railroad station,[4] or a teamster employed by the consignee to remove goods from the carrier's station,[5] are none of them connecting services. These are not all of the same class although they come to the same result. In the transfer, cartage, stock yards, and telegraph cases, there is no connecting service because the patron is dealing with but one service which uses the others as a subordinate instrumentality to perform its service. In the hackman and teamster cases the patron employs the additional service upon a separate basis altogether. But as to both sets of cases the law is that the particular service is free to make arrangements without regard to the peculiar law governing connecting service.

### *Topic B. Mutual Obligations in Successive Service*

**§ 515. Obligation of initial service to take to connection.** In successive service each party involved is not really

[1] *United States.*—St. Louis Drayage Co. v. Louisville & N. R. R., 65 Fed. 39 (1894).

*England.*—Roach v. Canadian Pacific Ry. Co., 1 Manitoba, 158 (1884).

[2] Central Stock Yards Co. v. Louisville & N. Ry. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. ed. 565 (1904).

See also St. Louis S. W. Ry. Co. v. Jackson & Co. (Tex. Civ. App.), 48 S. W. 853 (1909).

[3] People v. Western Union Telegraph Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637 (1897).

But see Western Union Tel. Co. v. Turner, 94 Tex. 304, 60 S. W. 432 (1901).

[4] *New York.*—Brown v. New York C. & H. R. R. R. Co., 151 N. Y. 674, 46 N. E. 1145 (1897).

But see:

*Michigan.*—Kalamazoo Hack & B. Co. v. Sootsma, 84 Mich. 194, 47 N. E. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693 (1890).

[5] *Illinois.*—Parmelee v. Lowitz, 74 Ill. 116, 24 Am. Rep. 276 (1874).

*Missouri.*—Nanson v. Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531 (1887).

asked to do more than his full duty within the limits of his own profession, except that the special circumstances may seem to call for unusual action to some extent. Of the duty of the initial company to undertake service to the point of connection with the succeeding company there can be no doubt.[1] If it be a case of carriage, the initial carrier is certainly asked no more than to act within his profession if he is requested to take certain goods tendered at one point on his line to another point where that line connects with the second carrier.[2] This elementary point has been most litigated in recent times in regard to telegraph companies, the initial company sometimes disliking to accept a message to a connecting point, there to be delivered to another company, very often a competitor. But the established duty in regard to connecting carriage was too close an analogy for the telegraph company to escape it. As was said in a Texas case:[3] "The law relating to the receiving and forwarding of telegraphic messages to connecting lines is so nearly analogous to that in regard to common carriers that the established rules of law that determine the liability of the common carrier apply with equal force to telegraph companies. Each can restrict its liability to its own line, but each must receive and forward with diligence to the connecting line, and each will be held liable for its failure or refusal to perform that duty."

[1] A contract by a carrier not to receive goods destined beyond its own line is void. Seasongood v. Tennessee & O. R. Transp. Co., 21 Ky. Law Rep. 1142, 54 S. W. 193 (1899).

[2] *New York.*—Babcock v. Lake S. & M. S. Ry. Co., 49 N. Y. 491 (1872).

*Nebraska.*—Fremont, E. & M. V. R. R. Co. v. Waters, 50 Neb. 592, 70 N. W. 225 (1897).

*Texas.*—San Antonio & A. P. Ry. Co. v. Stribling, 99 Tex. 319, 89 S. W. 963 (1905).

*Wisconsin.*—Hooper v. Chicago & N. Ry. Co., 27 Wis. 81, 9 Am. Rep. 439 (1870).

[3] See Western Union Telegraph Co. v. Simmons (Tex. Civ. App.), 93 S. W. 686 (1906), quoted.

**§ 516. Special law applicable thereto.**

There are some peculiarities in the situation because of the differences in the conditions. In case of carriage there are usually marks on the package designating its course; moreover its bills accompany it. In case of the telegraphing, however, it is a reasonable requirement by the first company that words designating the connection desired shall be sent with the message; [1] and, similarly, the second company may require that words designating its origin shall be paid for.[2] This duty resting upon the initial party to act is positive. It is no excuse that the initial carrier believes that the succeeding carrier will refuse to accept the goods.[3] And similarly a telephone company cannot justify its failure to handle a message promptly on the ground that it was sure that the connecting company would delay it so long that it was useless to try to put it through.[4]

**§ 517. Special duty to make delivery to connection.**

In several kinds of connecting service the duty of each successive party to deliver over to the next in turn is the normal one. Thus a telegraph company undertakes delivery in the place of address, which in this case should be at the office of the telegraph company designated as the connection. So, in certain kinds of carriage, as express service, the carrier is bound to deliver to the addressee. But the railroads and steamboats are not normally bound to do more than deposit the goods carried on their own wharves or at their own terminals. As will be seen later, there is thereupon a conflict of authority

[1] United States v. Northern Pac. Ry. Co., 120 Fed. Rep. 546 (1903).

[2] Atlantic & Pacific Telegraph Co. v. Western Union Telegraph Co., 4 Daly, 527 (1873).

[3] Wampum Cotton Mills v. Carolina & N. W. Ry. Co., 150 N. C. 608, 64 S. E. 588 (1909).

[4] Telephone Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 50 L. R. A. 277, 78 Am. St. Rep. 906 (1900).

as to how soon they cease to be liable as common carriers; but at all events it must be very soon thereafter, without any attempt on their part to make physical delivery. But in the case of connecting carriage there is no conflict of authority, the whole matter being settled by imperative considerations of convenience. It is universally established that when successive carriage is involved the law necessarily throws upon each carrier in turn the duty of tendering the goods for further transportation to the succeeding carrier; and normally, until he effectuates such delivery, the original carrier remains liable as a common carrier.[1] This liability would usually continue, as the cases just cited hold, until the first carrier has deposited the goods where the second carrier actually receives them, and given notice, as would generally be requisite, to the succeeding carrier that the goods are there awaiting his transportation.[2]

## § 518. Further duties of the initial service.

The initial carrier must give its successor the necessary

[1] *Connecticut.*—Palmer v. Chicago, B. & Q. R. R. Co., 56 Conn. 137, 13 Atl. 818 (1888).

*Georgia.*—Wallace v. Rosenthal, 40 Ga. 419 (1869).

*Michigan.*—Moore v. Michigan Central R. R. Co., 3 Mich. 23 (1853).

*Pennsylvania.*—Vannatta v. Central R. R. Co., 154 Pa. St. 262, 26 Atl. 384, 35 Am. St. Rep. 823 (1893).

*Tennessee.*—Insurance Co. v. Railroad Co., 8 Baxt. 268 (1874).

*West Virginia.*—Lewis v. Chesapeake & Ohio Ry. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816 (1900).

[2] *United States.*—Texas & P. R. R. Co. v. Reiss, 183 U. S. 621, 46 L. ed. 358, 22 Sup. Ct. 253 (1903).

*Alabama.*—Selma & M. R. R. Co. v. Butts & Foster, 43 Ala. 385, 94 Am. Dec. 694 (1869).

*California.*—Colfax Mountain Fruit Co. v. Southern Pac. Ry. Co., 118 Cal. 648, 46 Pac. 668 (1896), 50 Pac. 775, 40 L. R. A. 78 (1897).

*Kentucky.*—Louisville, St. L. & Texas Ry. Co. v. Bourne & Embry, 16 Ky. L. Rep. 825, 29 S. W. 975 (1895).

*Michigan.*—Rickerson Roller Mill Co. v. Grand Rapids & I. R. R. Co., 67 Mich. 110, 34 N. W. 269 (1887).

*New York.*—Sprague v. New York Cent. R. R. Co., 52 N. Y. 637 (1873).

instructions for forwarding the goods.[1] If, however, the second carrier finally refuses the goods, the first carrier has performed its duty as such. But there rests upon it still as in many other cases of unexpected interruption, the duty to store the goods [2] refused, and notify the consignor of the situation.[3] If, thereupon, the shipper wants his goods stopped at the end of the original transit he can have this done. As in successive service neither side is committed beyond the immediate service which is being rendered, he can revoke his orders to ship further.[4]

**§ 519. Obligation of second service to accept.**

Of the duty in each succeeding service to receive what is properly tendered to it by its predecessor in service there can also be no doubt. This really relates back to the primary duty of the original person requesting the service.[5] When, therefore, a succeeding carrier designated

[1] *Illinois.*—Michigan S. & N. I. R. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278 (1858).

*Michigan.*—Hutchings v. Ladd, 16 Mich. 493 (1868).

*Ohio.*—Little Miami R. R. Co. v. Washburn, 22 Ohio St. 324 (1872).

*Tennessee.*—Railroad Co. v. Southern Seating & Cabinet Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729 (1900).

[2] *United States.*—Buston v. Pennsylvania Ry. Co., 119 Fed. 808, 56 C. C. A. 320 (1903).

*Louisiana.*—Dalzell v. Steamboat Saxon, 10 La. Ann. 280 (1855).

*Maryland.*—Baltimore & Ohio R. R. Co. v. Schumacher, 29 Md. 168, 96 Am. Dec. 510 (1868).

*Minnesota.*—Wehmann v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 58 Minn. 22, 59 N. W. 546 (1894).

*Missouri.*—Cramer v. American M. U. Express Co. & Merchants' Dispatch Co., 56 Mo. 524 (1874).

*Tennessee.*—Bird v. Railroad Co., 99 Tenn. 719, 42 S. W. 451, 63 Am. St. Rep. 856 (1897).

[3] *United States.*—In re Peterson, 21 Fed. 885 (1884).

*Alabama.*—Louisville & N. R. R. Co. v. Duncan & Orr, 137 Ala. 446, 34 So. 988 (1902).

*Maine.*—Fisher v. Boston & Maine R. R. Co., 99 Me. 338, 59 Atl. 532, 68 L. R. A. 390, 105 Am. St. Rep. 283 (1904).

*Indiana.*—Grand Rapids & I. R. R. Co. v. Diether, 10 Ind. App. 206, 53 Am. St. Rep. 385 (1894).

[4] Wente v. Chicago, B. & Q. Ry. Co., 79 Neb. 175, 115 N. W. 859 (1907).

[5] *Illinois.*—Pittsburg, C., C. & St. L. Ry. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022 (1909).

by the consignor refuses to accept goods tendered by a preceeding, the default is really made to the consignor, the preceding carrier being his agent in asking this further transportation.[1] It is established law, made necessary from the character of the business, that it is the duty of common carriers to accept freight tendered by another common carrier, and that a consignor of goods to be carried over successive routes makes the first and each successive carrier his forwarding agent. This is from the necessities of the case. The consignors cannot practically travel with the goods which are shipped, and there must be some one who is responsible for transactions in regard to their shipment over the different routes.

**§ 520. Peculiar rules relating thereto.**

Each carrier who takes charge of the goods becomes an agent of the consignor to tender the goods.[2] And a telegraph company chosen as the connection is in default when it refuses to accept a message tendered by the initial company.[3] It follows that the connecting company

*Iowa.*—McMillan v. Chicago, R. I. & P. Ry. Co., 124 N. W. 1069 (1910).

*Maine.*—Dunham v. Boston & Maine R. R. Co., 70 Me. 164, 35 Am. Rep. 314 (1879).

*Texas.*—Gulf & Interstate Ry. Co. v. Texas & N. O. Ry. Co., 93 Tex. 482, 56 S. W. 328 (1900); Sterling v. St. Louis, I. M. & S. Ry. Co. (Tex. Civ. App.), 86 S. W. 655 (1905).

[1] The initial carrier is not in cases of successive carriage liable to the shipper for the refusal of the succeeding carrier to accept the goods. Dunbar v. Port Royal & A. Ry. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860 (1891). But the refusing carrier is liable directly to the shipper for such refusal. Crosby v. Pere Marquette R. R. Co., 131 Mich. 288, 91 N. W. 124 (1902).

[2] See particularly the case of Andrus v. Columbia & O. Steamboat Co., 47 Wash. 333, 92 Pac. 128, 130 (1907).

[3] *California.*—Thurn v. Alta Telegraph Co., 15 Cal. 472 (1860).

*Georgia.*—Conyers v. Postal Telegraph Cable Co., 92 Ga. 619, 19 S. E. 253, 44 Am. St. Rep. 100 (1893).

*Michigan.*—Western Union Telegraph Co. v. Carew, 15 Mich. 525 (1867).

*Tennessee.*—Telegraph Co. v.

can make no unreasonable requirement which would seriously interfere with the course of through service. A connecting railroad cannot require as to freight tendered by a connection that the shippers must themselves appear at the point of connection, and rebill their goods.[1] Nor can a telegraph company make the vexatious requirement that it will not recognize the tendering company as the agent of the sender unless he files a written power of attorney.[2]

**§ 521. Observance of patron's directions.**

The patron may himself decide by what successive parties he wishes the service performed and from these directions the parties would usually deviate at their peril.[3] Consequently a rule of a telegraph company that messages will be taken only by the most direct connections notwithstanding the sender's instructions is inconsistent with its duty.[4] And a refusal by a railroad company to take to the connection designated is illegal.[5] But even if such explicit directions are given the forwarding party should notify the patron if he knows that the use of the connection designated will probably cause unusual delay;[6]

Munford, 87 Tenn. 190, 10 S. W. 318, 2 L. R. A. 601, 10 Am. St. Rep. 630 (1889).

*Texas.*—Western Union Telegraph Co. v. Simmons (Tex. Civ. App.), 93 S. W. 686 (1906).

[1] Dunham v. Boston & Maine R. R. Co., 70 Me. 164, 35 Am. Rep. 314 (1879).

[2] Atlantic & Pac. Tel. Co. v. Western Union Telegraph Co., 4 Daly (N. Y.), 527 (1873).

[3] *Georgia.*—Georgia R. R. Co. v. Cole & Co., 68 Ga. 623 (1882).

*Minnesota.*—Brown & Haywood Co. v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961 (1896).

*New York.*—Hinckley v. New York Central & H. R. R. R. Co., 56 N. Y. 429 (1874).

*Wisconsin.*—Congar v. Galena & Chicago U. R. R. Co., 17 Wis. 477 (1863).

[4] Western Union Telegraph Co. v. Turner, 94 Tex. 304, 60 S. W. 432 (1901).

[5] San Antonio & A. P. Ry. Co. v. Stribling, 99 Tex. 319, 89 S. W. 963 (1905); Peeds River R. R. Co. v. Harrington (Tex. Civ. App.), 99 S. W. 1050 (1908); Thompson v. Missouri, K. & T. Ry. Co. (Tex.), 126 S. W. 257 (1910).

[6] Inman & Co. v. St. L. S. W. Ry.

and if it later turns out that the route designated is impracticable another may be chosen.[1] It is needless perhaps to add that if the patron leaves forwarding to the discretion of the initial party, he is bound to the disposition which his agent makes, but even then the agent himself will be liable for proper discretion in choosing the connection.[2]

**§ 522. Results of any disobedience.**

It should be noted also that failure of the previous party to the transit to transmit his instructions to his successor is a breach of duty to the patron and for the consequential deviation that party is liable.[3] And if the succeeding party knew of the violation of the instructions he is also subject to all the disabilities of one concerned in a deviation.[4] On the question of the position of a second party when a first party acts contrary

Co., 14 Tex. Civ. App. 39, 37 S. W. 37 (1896).

[1] Regan v. Grand Trunk Ry. Co., 61 N. H. 579 (1881); Andrus v. Columbia & O. Stb. Co., 47 Wash. 333, 92 Pac. 128 (1907).

[2] *Indiana.*—Snow v. Indiana, B. & W. Ry. Co., 109 Ind. 422 (1886).

*Tennessee.*—Post v. Railroad Co., 103 Tenn. 184, 52 S. W. 301, 55 L. R. A. 481 (1899).

[3] *United States.*—Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. 607 (1908); Harding v. International Navigation Co., 12 Fed. 168 (1882).

*Michigan.*—Hutchings v. Ladd, 16 Mich. 493 (1868).

*New York.*—Dana v. New York Central & H. R. R. R. Co., 50 How. Pr. 428 (1875).

*Ohio.*—Little Miami R. R. Co. v. Washburn, 22 Ohio St. 324 (1872).

*Pennsylvania.*—Forsythe v. Walker, 9 Pa. St. 148 (1848).

*Texas.*—Booth v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 37 S. W. 168 (1896).

[4] *United States.*—Patten v. Union Pac. Ry. Co., 29 Fed. 590 (1886).

*Colorado*—Denver & R. G. Ry. Co. v. Hill, 13 Colo. 35, 21 Pac. 914 (1889).

*Georgia.*—Georgia R. R. Co. v. Cole & Co., 68 Ga. 623 (1882).

*Massachusetts.*—Briggs v. Boston & Lowell R. R. Co., 6 Allen, 246, 83 Am. Dec. 626 (1863).

*New York.*—Johnson v. New York Central R. R. Co., 33 N. Y. 610, 88 Am. Dec. 416 (1865).

*Pennsylvania.*—Philadelphia, etc. R. R. Co. v. Beck, 125 Pa. St. 620, 11 Am. St. Rep. 924 (1889).

to instructions without disclosing that he is doing so, a few cases [1] have thought that the shipper may repudiate the subsequent transaction. But by the present weight of authority it is held that in forwarding goods to their destination by another connection than the one designated the first carrier is held out to the second carrier as having apparent authority; [2] so that the second carrier even has a lien upon the goods not only for his own charges, but for those which he had advanced against them relying upon the authority of the first carrier.

**§ 523. Discrimination permissible in granting favors.**

As all obligations of the succeeding party to undertake service may thus be related back to the rights of the original patron whom the preceding party represents, the succeeding party may refuse to do anything not within its duty to patrons generally for customers using particular agencies. And thus it may always refuse to render its service unless its charges are tendered it or secured to it, although it does not generally insist upon prepayment; [3] and, of course, it may refuse in taking over from one connection to advance the previous charges, although it does this in its dealings with other connections.[4] There have

[1] See Fitch v. Newberry, 1 Doug. (Mich.) 1, 40 Am. Dec. 33 (1843).

See also Jones v. Boston & A. R. R. Co., 63 Me. 188.

[2] *Colorado.*—Price v. Denver & R. G. Ry. Co., 12 Colo. 402, 21 Pac. 188 (1888).

*Georgia.*—Bird v. Georgia R. R. Co., 72 Ga. 655 (1884).

*Massachusetts.*—Crossan v. New York & N. E. R. R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766 (1889).

*Ohio.*—Bowman v. Hilton, 11 Ohio, 303 (1842).

*Rhode Island.*—Knight v. Providence & W. R. R. Co., 13 R. I. 572 (1882).

[3] Little Rock & M. Ry. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed. 400 (1894); Little Rock & M. Ry. Co. v. St. Louis S. W. Ry. Co., 63 Fed. 775, 27 U. S. App. 380, 26 L. R. A. 192, 11 C. C. A. 417, affirming 59 Fed. 400 (1894).

[4] Southern Indiana Exp. Co. v. United States Exp. Co., 92 Fed. 1022, 35 C. C. A. 172 (1899); Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 52 U. S. App. 732, 30 C. C. A. 142 (1898).

See also Baltimore & O. Ry. Co.

been some cases dealing with the obligations of connecting express companies in recent years in which both aspects of the problem were discussed. To quote from one [1] of them: "The same rule applies whether the articles of trade and commerce are received from the original consignor or from a connecting carrier. An express company, in the absence of contract, is under no obligation to receive and transport for the original consignor, or to continue the transportation for a connecting carrier, without the prepayment of its charges if demanded. The furnishing of equal facilities, without discrimination, does not require a common carrier to advance money to all other carriers on the same terms, nor to give credit for the carriage of articles of trade and commerce to all carriers because it extends credit for such services to others." [2]

### § 524. Discrimination forbidden where public duty involved.

But no policies can be adopted inconsistent with public duty whereby business coming from one connection is favored. Thus, in one of the early cases in public service, Bennett v. Dutton,[3] still a leading case, it was held that a stage line running from Nashua to Amherst could not adopt the rule of taking passengers who came from Lowell to Nashua on French's line and refuse those who came on Tuttle's line. In that pioneer case Chief Justice Parker, after stating the general principles of public duty, thus

v. Adams Express Co., 22 Fed. 32 (1884); Oregon Short Line & U. N. Ry. Co. v. Northern Pacific R. R. Co., 61 Fed. 158, 15 U. S. App. 479, 9 C. C. A. 409 (1894).

[1] Quoted from Southern Indiana Express Co. v. United States Express Co., 88 Fed. 659, 662 (1898).

[2] It is otherwise provided by statute in Indiana now; and the statute has been held to be constitutional. American Express Co. v. Southern Indiana Express Co., 167 Ind. 292, 78 N. E. 1021 (1906).

[3] 10 N. H. 481 (1839).

See also the language in Cutting v. Florida Ry. & Nav. Co., 30 Fed. 663 (1887), as to carriers of goods.

applied them to the case in hand: "The defendant might well have desired that passengers at Lowell should take French's line because it connected with his. But if he had himself been the proprietor of the stages from Lowell to Nashua, he could have had no right to refuse to take a passenger from Nashua, merely because he did not see fit to come to that place in his stage. It was not for him to inquire whether the plaintiff came to Nashua from one town or another, or by one conveyance or another. That the plaintiff proposed to travel onward from that place could not injuriously affect the defendant's business; nor was the plaintiff to be punished because he had come to Nashua in a particular manner." [1]

*Topic C. Facilities for the Interchange of Business*

**§ 525. Construction of physical connections not obligatory.**

One thing is as certain as anything can be at common law in this doubtful subject, and that is that those who have provided certain facilities in order to give a designated service, are under no obligation to go beyond the service they have professed and substantially extend their existing facilities so as to make physical connection with another service. To require this would be wholly outside the accepted theory of the proper restriction of public obligation to the profession made. In a leading

[1] Where there are two rival lines of steamboats on a river plying between the same points, and carrying freight for hire, both bearing the same relation to a railroad company and both seeking its services to forward their freight to the same points of destination, and the company systematically discriminates against one by charging on goods coming to or from it fifty cents a hundred more for freight than in the case of the other, a suit for such discrimination can be brought. Samuels v. Louisville & N. Ry. Co., 31 Fed. 57 (1887).

Where a tariff of a railroad company fixes a rate on shipments originating on its own line, or on certain enumerated connecting lines, it as-

Federal case.[1] in refusing to order a railroad company to make connections with a switching company, the court said: "Neither this nor any other provision of law requires of the common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freights. The act to regulate commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish." [2]

**§ 526. Statutory requirements go further.**

In some jurisdictions lately more explicit statutes have been passed providing that when two services nearly approach each other short lines for making connections should be constructed. And if this requirement is properly safeguarded it must be admitted that the legislation is not so outrageous as to be unconstitutional.[3] This indeed hardly goes beyond the definition of the obligation to provide proper facilities for the performance of the duty of the delivering of freight to a connection. When two lines nearly approach, it is not outrageous to consider this as virtually a connection.[4]

sumes the obligation to carry at that rate for shippers whose shipments originate on other lines as well; and, if such a shipper is required to pay for such services at a higher rate than that named in the tariff, he is entitled to recover the amount of the overcharge. Missouri, K. & T. Ry. Co. v. New Era Milling Co. (Kans.), 100 Pac. 273 (1909).

[1] Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co., 37 Fed. 567, 2 L. R. A. 289 (1889).

[2] See particularly Wisconsin, M. & P. R. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. 115 (1900), both to the same effect.

[3] *Alabama.*—Alabama G. S. R. R. Co. v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119 (1889).

*Nebraska.*—Missouri Pacific Ry. Co. v. Young, 25 Neb. 651, 41 N. W. 646 (1889).

[4] *Texas.*—International & G. N. Ry. Co. v. Railroad Commission of Texas, 99 Tex. 332, 89 S. W. 961 (1905).

## § 527. Obligation to have transfer facilities at junction points.

The traditional rule at common law has been that there is no obligation to permit connection at junction points.[1] This certainly cannot be true if there is a public station at that point, for at such a station, as has just been seen, goods must be received, whether tendered by a connection or anyone else. It may be true that there is not invariably an obligation to accept business at a private station from one connection, even if business is there accepted from another, as the Federal courts have held.[1] But can it be true that there is never an obligation to stop for the exchange of business at intersecting points if the railroad company decides not to establish a station, as the United States Supreme Court has held? [2] If there is a sufficient amount of business that would usually be tendered at a junction if a station should be

*Vermont.*—Rutland R. R. Co. v. Bellows Falls & S. R. St. Ry. Co., 73 Vt. 20, 50 Atl. 636 (1900).

The telephone cases furnish a close analogy. At common law at all events one telephone company was not bound to make physical connections with the lines of its rival so that through speech could be had. Matter of Baldswinsville Telephone Co., 24 N. Y. Misc. 221, 53 N. Y. Supp. 574 (1898). And consequently an arrangement by one company to give to another company all its through toll line business is not contrary to public policy. Home Telephone Co. v. North Manchester Telephone Co. (Ind. App.), 92 N. E. 558 (1910).

[1] *Kentucky.*—Shelbyville R. R. Co. v. Louisville C. & L. R. R. Co., 82 Ky. 541 (1885). But see Louisville & N. R. R. Co. v. Central S. Y. Co., 30 Ky. L. Rep. 18, 97 S. W. 778 (1906).

*Maryland.*—Pennsylvania R. R. Co. v. Baltimore, etc., Ry. Co., 60 Md. 263 (1883).

[2] Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 30 C. C. A. 142, 86 Fed. 407 (1898); Ilwaco Ry. & Nav. Co. v. Oregon Short Line Ry. Co., 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673 (1893).

[1] Atchison, T. & S. F. Ry. Co. v. Denver & N. O. Ry. Co., 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185 (1884); Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. 246 (1909).

See further, St. Louis & S. F. Ry. Co. v. Marrs, 60 Ark. 637, 31 S. W. 42 (1895).

opened, according to the more advanced views now held there ought to be a public station established. A New Hampshire court [1] has gone so far as to say that a union station ought to be built by two roads which made connections in a city, if it be shown that public convenience required it.

**§ 528. Whether freight must be taken in original cars.**

As to whether transportation must be given to the goods offered by a first carrier to a second carrier in the cars in which they are tendered by the first carrier, regardless of the desires of the second carrier, there is still some conflict of authority. In Oregon Short Line and Utah Northern Railway Company v. Northern Pacific Railroad Company,[2] the utilization of foreign cars being in question, the law as it then stood, was summarized thus by Mr. Justice Field: "As the receiving company is under no obligation to take the freight in the cars in which it is tendered, and transport it in such cars, when it has cars of its own, not in use, to transport it, there can be no custom that it shall pay the owner of such cars, should it receive them in such case, car mileage for their use."

**§ 529. Such transportation now usually held obligatory.**

On the other hand there are cases which hold that the railroad is obliged to accept the cars of another road filled with goods and carry them through to their destination. In an opinion written by Mr. Justice Cooley, in the case of Michigan Central Railroad Company v. Smithson,[3] is the following statement which probably

[1] Concord & M. R. R. Co. v. Boston & Maine R. R. Co., 67 N. H. 464, 41 Atl. 263 (1893).

[2] 51 Fed. 465 (1892). See also Little Rock & M. Ry. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed. 400 (1894). And see Green Bay Lumber Co. v. Chicago, R. I. & P. Ry. Co., 102 Iowa, 292, 71 N. W. 406 (1897). Note the limitation in Central of Ga. Ry. Co. v. Cook & L., 4 Ga. App. 698 (1908).

[3] 45 Mich. 212, 7 N. W. 791 (1881).

represents the present law: "The primary fact that must rule this controversy is that the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose, and which are upon wheels adapted to its gauge. It is compelled to do so, first, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to anyone. It is compelled to do so, second, by its own interest. To attempt to stop every car offered to it at its termini, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business." [1]

[1] See, to the same effect:

*United States.*—Rae v. Grand Trunk Ry. Co., 14 Fed. 401 (1882).

*Alabama.*—Louisville & N. R. R. Co. v. Boland, 96 Ala. 626, 11 So. 667 (1892).

*Arkansas.*—St. Louis Southwestern Ry. Co. v. State, 85 Ark. 311, 107 S. W. 1180 (1907).

*Illinois.*—Peoria & P. M. Ry. Co. v. Chicago, R. I. & Pac. Ry. Co., 109 Ill. 135, 50 Am. Rep. 605 (1884).

*Iowa.*—Baldwin v. Railroad Co., 50 Ia. 680 (1879); Burlington., C. R. & N. Ry. Co. v. Dey, 82 Ia. 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477 (1891).

*Kentucky.*—Louisville & N. R. R. Co. v. Williams, 95 Ky. 199, 15 Ky. L. Rep. 548, 24 S. W. 1, 44 Am. St. Rep. 214 (1893). See also Louisville & N. Ry. Co. v. Central S. Y. Co., 30 Ky. L. Rep. 18, 97 S. W. 778 (1906).

*Massachusetts.*—Vermont & M. R. R. Co. v. Fitchburg R. R. Co., 14 Allen (Mass.), 462, 92 Am. Dec. 785 (1867); Mackin v. Boston & A. R. R. Co., 135 Mass. 201, 46 Am. Rep. 456 (1883).

*Michigan.*—McMillan v. Chicago R. I. & P. Ry. Co., 124 N. W. 1069 (1910).

*Missouri.*—Thomas v. Missouri Pacific Ry. Co., 109 Mo. 187, 18 S. W. 980 (1891).

*Nebraska.*—Chicago, B. & Q. R. Co. v. Curtis, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456 (1897).

*New York.*—Hudson Valley Ry. Co. v. Boston & Maine R. R. Co., 45 N. Y. Misc. 520, 92 N. Y. Supp.

## § 530. Qualifications of the doctrine.

It may be added that there is no duty to accept cars which are not of a character to fit in with the equipment of the company to which they are tendered or in such a defective condition as to be dangerous.[1] Where this duty to receive the cars is established it is certainly true that the second railroad can make no charge for hauling the cars independently of the regular freight for their contents.[2] On the other hand it is probably true that the second carrier is not under any more obligation to pay mileage for the use of the cars than is stated in a preceding paragraph. But a fair system for the interchange of cars will be respected by the courts, as will be seen in a succeeding paragraph.

## § 531. Provision of cars for further service.

However no case has ever gone so far at common law as to assert that shippers could insist that the initial carrier should provide them with sufficient cars for the transportation of their goods through to any part of the con-

928 (1904), affirmed 94 N. Y. Supp. 545, 106 App. Div. 375 (1905).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Lone Star Salt Co., 26 Tex. Civ. App. 531, 63 S. W. 1025 (1901); Texas & Pacific Ry. Co. v. Texas Short Line R. R. Co., 35 Tex. Civ. App. 387, 80 S. W. 567 (1904); Texas & Pac. Ry. Co. v. Carlton, 60 Tex. 397 (1883).

[1] *United States.*—Baltimore & P. Ry. Co. v. Mackey, 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct. 491 (1895).

*Georgia.*—Central of Ga. Ry. Co. v. Cook & L. 4 Ga. App. 698 (1908).

*Kentucky.*—Louisville & N. Ry. Co. v. Williams, 95 Ky. 199, 24 S. W. 1, 15 Ky. Law Rep. 548, 44 Am. St. Rep. 214 (1893).

*Nebraska.*—Chicago, B. & Q. R. R. Co. v. Curtis, 51 Neb. 442, 71 N. W. 42, 66 Am. St. Rep. 456 (1897).

*Ohio.*—Pennsylvania Ry. Co. v. Snyder, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700 (1896).

*Texas.*—Texas & Pac. Ry. Co. v. Carlton, 60 Tex. 397 (1883).

*Wisconsin.*—Miltimore v. C. & N. W. Ry. Co., 37 Wis. 190 (1875).

[2] Harrison v. Midland Ry. Co., 62 L. J. Q. B. (N. S.) 225 (1893). But query whether a shipper can get his own cars hauled thus for nothing. Green Bay Lumber Co. v. Chicago, R. I. & P. Ry. Co., 102 Ia. 292, 71 N. W. 406 (1897).

tinent that can be reached by connecting lines.[1] "At common law shippers cannot insist that the initial carrier shall provide them with sufficient cars for the transportation of their goods, to any point beyond its own line of road; for the carrier's obligation to provide equipments was always held limited to service over its own route." [2] But a railroad may well profess to furnish cars for service beyond its route.[3] "For one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England and their fruits to the North, and their lumber and coal to the four quarters of the Union, without change from consignor to consignee." [4]

**§ 532. Statutory requirement of through facilities.**

But it is not impossible that statutes may even go to the length of requiring such through service by reason of commercial necessity. In a very late case,[5] in declaring unconstitutional a statute requiring a railroad to furnish its cars for through transportation off its own route the United States Supreme Court based its decision simply

[1] *Florida.*—State v. Louisville & N. R. R. Co., 51 Fla. 311, 40 So. 885 (1906).

*Illinois.*—People ex rel. v. Chicago & A. R. R. Co., 55 Ill. 95, 8 Am. Rep. 631 (1870).

*Indiana.*—Pittsburg, Cincinnati & St. Louis R. R. Co. v. Morton, 61 Ind. 539, 576, 28 Am. Rep. 682 (1878).

*Massachusetts.*—Pitlock v. Wells Fargo & Co., 109 Mass. 452 (1872).

*New York.*—Babcock v. Lake Shore & M. S. Ry. Co., 49 N. Y. 491 (1872).

[2] Quoted from Gulf, C. & S. F. Ry. Co. v. State (Tex. Civ. App.), 120 S. W. 1028 (1909).

[3] It is apparently the duty of a connecting carrier on a joint through rate to accept cars delivered to it by the initial carrier. Pennsylvania Refining Co. v. Western N. Y. & P. R. R. Co., 208 U. S. 208, 52 L. ed. 456, 28 Sup. Ct. 268 (1908).

[4] Quoted from St. Louis Southwestern Ry. Co. v. State, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33 (1907).

[5] Louisville & N. R. R. Co., v Central S. Y. Co., 212 U. S. 132, 143, 53 L. ed. 441, 29 Sup. Ct. 246 (1909).

upon the point that the statute did not provide sufficient safeguards, not even providing for compensation: "It was argued that the requirement that the plaintiff in error should deliver its own cars to another road was void under the Fourteenth Amendment as an unlawful taking of its property. In view of the well known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The constitution of Kentucky is simply a universal undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." [1]

*Topic D. Joint Through Routing and Rating*

**§ 533. Through arrangements not obligatory.**

At common law one public service could not be compelled to enter into arrangements with another for continuous service as a single unit for a single rate. Through arrangements were left altogether to such private agreements as the parties should negotiate.[2] This is well ex-

[1] Much the same language is used in Thompson v. Missouri, K. & T. Ry. Co. (Tex.) 128, S. W. 109 (1910).

[2] Railroads can establish through rates on certain commodities without doing so on others. Central of Ga. Ry. Co. v. Augusta Brokerage Co., 122 Ga. 646, 50 S. E. 473 (1905).

plained in the leading case of the Atchison, Topeka & Santa Fe Railroad Co. v. Denver & New Orleans Railroad Co.[1] where the Supreme Court squarely held that a railroad might enter into through traffic agreements with one railroad, pro-rating its through rate, and at the same time refuse to enter into a similar agreement with another railroad traversing the same territory as the first and having the same terminus.[2] To quote but one paragraph from the elaborate opinion of Chief Justice Waite: "At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work." [3]

**§ 534. Initial company may select connecting line.**

It follows plainly enough that the initial carrier has

[1] 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. 185 (1884). A carrier need not pro rate with one connection upon the same terms that it does with another. Samuels v. Louisville & N. Ry. Co., 31 Fed. 57 (1887).

[2] Telephone companies need not establish through toll line connections. Albany Telephone Co. v. Terry (Tex. Civ. App.), 127 S. W. 567 (1910).

[3] These doctrines have prevailed generally in the state courts.

*Georgia.*—State v. Wrightsville & T. Ry. Co., 104 Ga. 437, 30 S. E. 891 (1898).

*Indiana.*—Snow v. Indiana, B. & W. Ry. Co., 109 Ind. 422, 9 N. E. 702 (1886).

entire control over the situation.[1] In the recent Citrous Fruit case in the United States Supreme Court [2] the policy of the Pacific railroads under which the right of routing beyond its own terminal was reserved to the initial carrier to exercise in his discretion at any stage as the condition of guaranteeing through rates to the shipper was held its right beyond question. As the court tersely said in its decision: "The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract the carrier may make such terms as it pleases, at least so long as they are reasonable and do not otherwise violate the law."

[1] Citation should be made here of the many cases which held that the original Interstate Commerce Act left the railroads free as before to make such arrangements for through routing, billing, or rating as they pleased without its being a refusal of equal facilities for the interchange of traffic to make such through arrangements with one company while refusing to do so with another. Central S. Y. Co. v. Louisville & N. Ry. Co., 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339 (1904); Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co., 2 L. R. A. 289, 2 Int. Com. Rep. 351, 37 Fed. 567, 629, 630 (1889); Little Rock & M. R. R. Co. v. St. Louis, I. M. & S. Ry. Co., 2 Int. Com. Rep. 763, 41 Fed. 559 (1890); Chicago & N. W. Ry. Co. v. Osborne, 3 C. C. A. 347, 4 Int. Com. Rep. 257, 52 Fed. 912 (1892); Oregon Short Line & U. N. Ry. Co. v. Northern Pac. Ry. Co., 4 Int. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158 (1894), affirming 4 Int. Com. Rep. 249, 51 Fed. 465 (1892); Little Rock & M. Ry. Co. v. St. Louis & S. W. Ry. Co., 26 L. R. A. 192, 4 Int. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 280, 63 Fed. 775 (1894); St. Louis Drayage Co. v. Louisville & N. Ry. Co., 5 Int. Com. Rep. 137, 65 Fed. 39 (1894); Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. Ry. Co., 73 Fed. 438 (1896); Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142 (1898); Allen v. Oregon Ry. & Nav. Co., 98 Fed. 16 (1899).

But see (practically overruled on this point) New York & N. Ry. Co. v. New York & N. E. Ry. Co., 50 Fed. 867 (1892); Augusta S. Ry. Co. v. Wrightsville & T. Ry. Co., 74 Fed. 522 (1896).

[2] Southern Pacific Ry. Co. v. Interstate Comm. Comm., 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. 330 (1906).

**§ 535. Limitations upon joint rates.**

It is entirely proper that two carriers should combine to form a single route and name a single rate for that haul. This will usually result in a lower rate than the sum of the two individual rates by reason of the relative economy of the long haul. For plainly a railroad may charge more for transporting its local passenger between two termini than it receives for transporting a through passenger over the same distance in the division of the through rate with other railroads.[1] When such a through rate has been established by the agreement of the carriers, every shipper is entitled to it. If some shippers are given an advantage over others in such shipment it will be a case of illegal discrimination.[2]

**§ 536. Statutory provision for through routes.**

But the statutes are going further than to make the common law more intensive; they are making the legal obligation more extensive. The common law right of the initial company to make through traffic arrangements with some one connecting line and throw all the business which it will take at the through rate into the hands of that one line, notwithstanding the desires of the shipper, has, of late, caused such fears that statutes are being passed in recent years giving the power to the regulating body to compel the making of a joint rate. This power was given to the English Railway and Canal Commission in 1888,[3] and to the Interstate Commerce Commission in 1906.[4] Our Federal legislation was anticipated in the various

[1] Union Pacific Ry. Co. v. United States, 117 U. S. 355, 6 Sup. Ct. 772, 29 L. ed. 920 (1886); Texas & P. Ry. Co. v. Interstate Comm. Comm., 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940 (1896); Parsons v. Chicago & N. W. Ry. Co., 167 U. S. 447, 17 Sup. Ct. 887, 42 L. ed. 231 (1897); Tozer v. United States, 52 Fed. 917 (1892).

[2] Blair v. Sioux City & P. Ry. Co., 109 Ia. 369, 80 N. W. 673 (1899); Bras v. McConnell, 114 Ia. 401, 87 N. W. 290 (1901).

[3] 51 & 52 Vict., Chap. 25 (1888).

[4] Act of July 29, 1906.

states, Minnesota and Texas for example. It will be noticed that the commission by these statutes is to judge as to whether public convenience requires the additional through routes asked. The shipper, therefore, now as before has no rights in the matter until the through rate has been duly established, then of course he may demand it.

### § 537. Constitutionality of such statutes.

The problem has not been settled though it has been raised as to whether such statutes are constitutional; but in view of the later idea of the obligation of the carrier to the whole community there seems to be little doubt of the decision. In holding the Minnesota statute valid, Mr. Justice Collins said: [1] "We see no reason why, under the amendatory act the commission cannot lawfully compel a joint arrangement in a case like this. The evidence shows that the location of the Duluth road and the Minneapolis and St. Louis road, their track facilities, equipment, etc., are such that, by operating together under joint traffic agreements, the cost of the service can be greatly lessened. The public has, at least, a right to share in the benefits of this condition. If it is judicious to do so and of public benefit to have joint traffic arrangements in any given case, why should not the public be permitted to compel that such arrangements be made?" [2]

### § 538. Application of these statutes.

Two recent cases in the Supreme Court of the United States bring out the limitations under which the extension of the common law doctrines by legislation is proceeding. In the first of these cases [3] it was held that the general

[1] State v. Minneapolis & St. L. R. R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514 (1900).

[2] Inman v. St. Louis S. W. Ry. Co., 14 Tex. Civ. App. 39, 37 S. W. 37 (1896), should be noted.

[3] Interstate Comm. Comm. v. Delaware, L. & W. Ry. Co., 216 U. S. 531, 30 Sup. Ct. 417 (1910).

power given to the Interstate Commerce Commission in the recent amendments to compel an unwilling railroad to make connections with a branch line was not intended "to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily, at least, to provide for shippers seeking an outlet either by a private road or branch." In the second of these cases [1] it was held that joint through routes may not be established by the commission except in accordance with the powers delegated to it in the statute, and that therefore where one reasonable through route has been established by the company in question it cannot be compelled to enter into another in which it gets a far shorter haul, simply because the public might prefer to have the advantage of an alternative route.

**§ 539. Statutory regulation of connecting service.**

This modern conception of the fuller extent of the public duty to all concerned in relation to the making of connections has manifested itself of late in many statutes requiring proper arrangements for the interchange of business at junction points. These now receive more respect from the courts than they once did.[2] And in another class of cases altogether it has been held that legislation compelling telephone companies to make switch board con-

[1] Interstate Comm. Comm. v. Northern Pac. Ry. Co., 216 U. S. 538, 30 Sup. Ct. 415 (1910).

[2] The possibility of constitutionally compelling the interchange of business upon equal terms is shown in various recent cases, such as:

*Kentucky.*—Louivsille & N. R. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. 960, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447 (1901); Louisville & N. Ry. Co. v. Central S. Y. Co., 97 S. W. 778, 30 Ky. Law Rep. 18 (1906).

*Minnesota.*—Jacobson v. Wisconsin, M. & P. R. R. Co., 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389 (1898).

*Missouri.*—State of Missouri v. St. Louis & S. F. R. R. Co., 105 Mo. App. 207, 79 S. W. 714 (1904).

*New York.*—Hudson Valley Ry. Co. v. Boston & Maine R. R. Co., 106 App. Div. 375, 94 N. Y. Supp. 545 (1905).

nection so that through speech may be had has been held constitutional.[1] This is going to an extreme as will be seen in another connection.

**§ 540. Policy of such legislation.**

It is well worthy of particular remark that the powers granted commissions in this respect now go so far as to authorize the making of orders as to running of trains by the intersecting roads, so as to make convenient connections. It is characteristic of the new appreciation of the extent of public duty that the United States Supreme Court finds no difficulty with these statutes. Speaking of the objection raised to the regulation of the conduct of one public service in its relations with another for the benefit of all concerned, that court said in what seems certainly destined to be a leading case:[2] "This reduces itself to the contention that, although the governmental power to regulate exists in the interest of the public, yet it does not extend to securing to the public reasonable facilities for making connection between different carriers. But the proposition destroys itself, since at one and the same time it admits the plenary power to regulate and yet virtually denies the efficiency of that authority.[3]

[1] Telephone companies may be compelled by statute to make switchboard connections. Billings Mutual Telephone Co. v. Rocky Mt. Bell Telephone Co., 155 Fed. 207 (1907). But the common law obligation to this effect is limited to those cases where the company has not provided through lines of its own. Home Telephone Co. v. North Manchester Telephone Co. (Ind. App.), 92 N. E. 558 (1910).

[2] Atlantic Coast Line Ry. Co. v. North Carolina Corp. Comm., 206 U. S. 1, 22, 51 L. ed. 933, 27 Sup. Ct. 585 (1907).

[3] A statute making it the duty of railroad corporations to stop all trains carrying passengers at the junction of other railroads a sufficient length of time to allow the transfer of passengers and their baggage, enforced. State ex rel. McPherson v. St. Louis & S. F. Ry. Co., 105 Mo. App. 207, 79 S. W. 714 (1904).

A statute requiring common carriers to afford all reasonable,

proper, and equal facilities for traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property to and from their several lines and connecting lines is violated by a railroad changing its times card by which a connection with a connecting road which was of general convenience was discontinued. Southern Ry. Co. v. Commonwealth, 37 S. E. 294, 98 Va. 758 (1900).

# PART IV. JUSTIFICATION FOR REFUSING SERVICE

## CHAPTER XVI

### INEXCUSABLE BREACHES OF PUBLIC DUTY

§ 550. Refusal illegal without proper justification.

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§ 565. Race prejudice.
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**§ 550. Refusal illegal without proper justification.**

According to the primary principles discussed in the preceding chapters one is bound to serve all who come within his public profession. To excuse himself from such service he must show justification based upon public policy. Once committed to public employment he can no longer refuse his service at his whim or caprice. When the obligation of public service is clearly established by showing that there is a plain case within the public undertaking, all conditions precedent being satisfied, the only method of avoiding liability is to show that there is justification for the suspension of service in general or some special excuse for the particular refusal. And it is obvious that such justification must be upon reasonable grounds relating to the possibility of performing the service, and such excuse must show that the particular request is truly improper. A refusal to serve upon any other basis is a breach of public duty, no matter what plausible grounds may be urged in its defense. Such breaches are almost too obvious to be discussed as excuses; they are rather illustrations of the primary duty. As such the facts of the leading cases are stated rather fully in this chapter.

*Topic A. Distasteful Service*

**§ 551. Malicious motives.**

One engaged in a public employment must serve friends and enemies alike. This is too obviously the consequence of public duty to provoke much discussion. In one case a traveler recovered for being refused by the manager of a hotel who bore a grudge against him because he had previously attempted to procure the discharge of the

manager. The court held the proprietor liable.[1] In another case a shipper recovered from a railroad for refusal to accept goods tendered for shipment, because of personal disputes with the shipper.[2] And the court charged the jury that no circumstances justifying the refusal of the goods appeared.

### § 552. Malice as a factor.

It should be noted in this connection that if the request refused is one as to which there is no public duty involved it makes no difference with what motive the refusal is made.[3] But as regulations must be enforced in good faith, if service is cut off from spite the regulation will not be a defense for what is done.[4] Malice may not work a wrong. But malice may destroy a justification.

### § 553. Refusal dictated by favoritism.

It may be admitted that there are sometimes good reasons for giving one applicant for service priority over another which justify refusing one applicant in favor of another. But such refusal will constitute an illegal discrimination unless it is in accordance with the general rules of priority later discussed. Thus a gas company cannot give the supply of one of its stockholders priority and thereby excuse its refusal to serve one of the general public.[5] So a common carrier by sea cannot lawfully

[1] Willis v. McMahan, 89 Cal. 156, 26 Pac. 649 (1891).

See also Avinger v. South Carolina R. R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716 (1888).

[2] Lanning v. Sussex R. R. Co., 1 N. J. L. Jour. 21 (1878).

See also Western Union Telegraph Co. v. Lilliard, 86 Ark. 208, 110 S. W. 1035 (1908), holding that it makes no difference with what motive the refusal is made.

[3] Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982 (1909).

[4] Phelan v. Boone Gas Co. (Iowa), 125 N. W. 208 (1910).

[5] Crescent Steel Co. v. Equitable Gas Co., 23 Pitts. L. Jour. 316 (1892).

Compare Lafaye v. Harris, 13 La. Ann. 553 (1858).

reject lumber, a commodity which it professes to carry, and afterwards receive and transport cotton and other goods, where, at the time of the tender, there was room in the vessel for the rejected lumber.[1]

**§ 554. Discrimination for its own ends.**

In an astounding Canadian case [2] a railroad openly announced that it would not carry any more cedar lumber off its line. The court held that it might thus limit its undertaking, although apparently the railroad adopted this policy in order to keep the cedar timber on its line for its own uses. But in a leading American case it was held that a railroad could not discriminate against shippers who would not sell their ties to it at a fixed price.[3] There can be no doubt that the latter case is the correct one.

**§ 555. Disagreeable persons.**

The mere fact that a person is distasteful or has ungentlemanly habits will not justify a carrier or an innkeeper in refusing him. The question, or a very similar one, arose in Prendergast v. Compton.[4] The plaintiff, a passenger, sued the defendant, the captain of the ship in which he was being transported, for excluding him from eating in the "cuddy," upon the ground that his conduct was vulgar and offensive. There was evidence that he was in the habit of reaching across other passengers and of taking potatoes and boiled bones in his fingers. The court held, however, for the passenger: "It would be difficult to say, if it rested here, in what degree want of

[1] Ocean Steamship Co. v. Savannah Locomotive Works & S. Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867 (1909).

[2] Rutherford v. Grand Trunk Ry. Co., 5 Rev. Leg. (Can.) 483 (1873).

[3] Louisville E. & St. L. R. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311 (1892).

[4] 8 C. & P. 454 (1837).

polish would, in point of law, warrant a captain in ex cluding a passenger from the cuddy. Conduct unbecom ing a gentleman, in the strict sense of the word might justify him: but in this case there is no imputation of the want of gentlemanly principle."

**§ 556. Unmannerly persons.**

These moderate principles prevail generally. In an American case [1] of a person who had made himself dis agreeable upon a street car, it was said: "It is not all con duct which may be said to be outside the pale of good breeding that will bar a passenger from the protection o the law against the carrier for the act of the servant in ejecting him from the car." These quotations are given to show that the law is rather easy-going in these matters Those who engage in a public service must deal with all sorts and conditions of men; and those who are being served along with the general public must not be too nice or too finical.

**§ 557. Slight misbehavior.**

Upon these principles slight misbehavior is not a sufficient excuse for a refusal to serve. As was said in one of the telephone cases [2] where the subscriber had made some vulgar talk: "Reasonable caution must be taken lest injustice be done. Some allowance is to be made for the infirmities of human nature. Local customs are not to be ignored. Habit sometimes excuses, if it does not justify, the use of objectionable language. Early environment more often than an evil spirit is respons ible for bad manners. Undisclosed emergencies may

[1] Eads v. Metropolitan St. Ry. Co., 43 Mo. App. 536 (1891).

[2] Huffman v. Marcy Mutual Telephone Co. (Iowa), 121 N. W. 1033, 23 L. R. A. (N. S.) 1010 (1909).

In People v. McKay, 46 Mich 439 (1881), it was held that one could not be excluded from a waiting room for spitting.

extenuate lapses from propriety." By these principles the profane retort of an exasperated traveller to an innkeeper who was keeping him out in the night until he would answer a lot of questions was held to be no excuse for the subsequent refusal to take him in.[1] "Suppose he did add the words, 'and be damned to you,' is that a sufficient reason for keeping a man out of an inn who has travelled till midnight? I think that the prosecutor was not guilty of such misconduct as would entitle the defendant to shut him out of his house."

### § 558. Personal objections.

However much the many antics of children may wear upon the nerves of some people, boys who are skylarking [2] cannot be ejected from a street car. Nor is unconventionality of costume an excuse unless it be indecent. Upon this principle it was held that a woman in bloomers could not be excluded from an inn.[3] And so a railroad cannot dictate what dress its passengers shall wear. One may travel who wears the uniform of a rival line.[4] These principles go far. Even a man who has plainly been drinking cannot be rejected.[5]

### § 559. Immoral persons.

An excellent illustration of this general principle that there can be no refusal on merely personal grounds alone if the application is proper in itself is Brown v. Memphis

[1] Rex v. Ivens, 7 Car. & P. 213 (1835). Similarly a profane retort made by a passenger to a conductor under extreme provocation was held not to be a sufficient excuse for ejecting him. El Paso Electric Ry. Co. v. Alderete, 36 Tex. Civ. App. 142, 81 S. W. 1246 (1904).

[2] Rosenberg v. Brooklyn Heights St. Ry. Co., 91 N. Y. App. Div. 580, 86 N. Y. Supp. 871 (1904).

[3] Regina v. Sprague, 63 J. P. 233 (1899).

[4] South Florida R. R. Co. v. Rhodes, 25 Fla. 40, 5 So. 633, 3 L. R. A. 733, 23 Am. St. Rep. 506 (1889).

[5] See Story v. Norfolk & S. R. R. Co., 133 N. C. 59, 45 S. E. 349 (1903).

& Corinth Railroad.[1] The plaintiff brought this suit for being ejected by the defendant's servants from the ladies' car, her behavior while on the car being admittedly ladylike. The defendant pleaded that the plaintiff was a notorious public courtesan; but notwithstanding this plea Hammond, district judge, charged the jury "that the same principles of law were to be applied to women as men in determining whether the exclusion was lawful or not; that the social penalties of exclusion of unchaste women from hotels, theatres and other public places could not be imported into the law of common carriers; that they had a right to travel in the streets and on the public highways, and other people who travel must expect to meet them in such places; and, as long as their conduct was unobjectionable while in such places, they could not be excluded. The carrier is bound to carry good, bad and indifferent, and has nothing to do with the morals of his passengers, if their behavior be proper while travelling." [2]

**§ 560. Undesirable persons.**

Certain persons because of their personal notoriety are often undesirable customers because they injure general patronage; indeed this is true to some extent of all in certain callings—prize fighters,[3] for one example. In this connection the important case of Pearson v. Duane [4] should be cited. Duane had been ordered from San Francisco by the Vigilance Committee and upon the

[1] 5 Fed. 499 (1880); S. C., 4 Fed. 37 (1880). Compare Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242 (1885), where the parties resorted to an inn for the purposes of prostitution.

[2] See also Meisner v. Detroit, B. & I. W. Ferry Co., 154 Mich. 545, 118 N. W. 14 (1908). But see Stevenson v. West Seattle Land & Improvement Co., 22 Wash. 84, 60 Pac. 51 (1900).

[3] See the *dictum* to this effect in Nelson v. Boldt, 180 Fed. 779 (1910).

[4] 4 Wall. 605, 18 L. ed. 447 (1867).

discovery of that fact Pearson expelled him from his ship. The United States Supreme Court hardly knew whether there were circumstances of justification in this case or not. "Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal. If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case Duane could have well been refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme."

**§ 561. Supposed interest of patron.**

It has been suggested that the shipmaster in the case just discussed [1] might justify himself in refusing to take the passenger to San Francisco where a violent fate probably eventually awaited him by saying that the refusal was in his own interest. So a ferryman once attempted to excuse his refusal to take a passenger who apparently easily succumbed to temptation across to a city on the ground that she usually reappeared late at night in an intoxicated condition.[2] But this ground is obviously indefensible.

**§ 562. Wiser course for patron.**

Certainly it is not the business of the public servant to decide whether the patron is wise in pursuing the course he is setting out upon. Thus a telegraph company cannot escape liability for refusal to accept a message for transmission because, in the opinion of the

[1] Pearson v. Duane, 4 Wall. 605, 18 L. ed. 447 (1866).

[2] Stevenson v. West Seattle L. & I. Co., 22 Wash. 84, 60 Pac. 51 (1900).

operator, it would not have accomplished its purpose if sent.[1] And so where a telephone company has contracted to submit and deliver a message summoning a physician, it cannot excuse its liability for delay in delivery by proof that it was not the custom of the physician to make professional calls at a distance without prepayment or guaranteed payment of his charges.[2]

### § 563. Unwelcome service.

An interesting point is whether compliance with the request for a party in interest that service be discontinued will excuse the proprietors of the service, or whether they must undertake the often distasteful task of forcing service upon one. That a buyer has notified a railroad company not to bring any more of the seller's property consigned to the buyer, does not absolve the railway of its duty to the seller to furnish him transportation requested.[3] And the fact that the sendee of a telegram has notified the company to deliver no telegrams at his house on Sunday will not apparently excuse the company from its obligation to the sender of attempting to deliver such telegrams.[4]

### § 564. Wrongful refusal.

This means that the duty to the moving party must be performed notwithstanding the expressed dissent of the receiving party. So the refusal of a connecting carrier to receive freight for a certain consignee will not relieve the initial carrier from liability for a penalty for a failure to receive such freight.[5] But a carrier may demand its pay

[1] Cordell v. Western Union Telegraph Co., 149 N. C. 402, 63 S. E. 71 (1908).

[2] Western Union Telegraph Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148 (1889).

[3] Houston, E. & W. T. Ry. Co. v. Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225 (1898).

[4] Brashears v. Western Union Telegraph Co., 45 Mo. App. 433 (1891).

[5] Wampum Cotton Mills v. Carolina & N. W. Ry. Co., 150 N. C. 608, 64 S. E. 588 (1909).

in advance for goods directed to certain consignees.[1] For there is no discrimination where there is no duty.

*Topic B. Disadvantageous Service*

**§ 565. Race prejudice.**

A carrier cannot refuse to carry persons because of their color or race, whatever may be the prejudices current against them in the community.[2] It must be admitted that this requirement may result in pecuniary loss. This is particularly true in the case of innkeeping; but the public duty is, nevertheless, imperative in this calling as in all others.[3] However, one southern court was so impressed with this hardship that it said in a *dictum* that a landlord could exclude from his inn persons so objectionable to the patrons of the house on account of the race to which they belong, that it would injure the business to admit them.[4]

**§ 566. Separation of the races.**

However, it would seem to be the plain right of the carrier or indeed the innkeeper, to assign the different races to different accommodations, since the management of the business is left to the proprietor.[5] Therefore

[1] Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 168 Fed. 161, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982 (1909).

[2] Brown v. Memphis & C. Ry. Co., 5 Fed. 499 (1880).

[3] Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L. R. A. 558, 33 Am. St. Rep. 527 (1892).

[4] State v. Steele, 106 N. C. 766, 11 S. E. 478, 8 L. R. A. 516, 19 Am. St. Rep. 573 (1890).

[5] *United States.*—Houck v. Southern Pac. Ry. Co., 38 Fed. Rep. 226 (1888); Chiles v. Chesapeake & O. Ry. Co., 218 U. S. 71, 30 Sup. Ct. 667 (1910).

*Alabama.*—Bowie v. Birmingham Ry. & El. Co., 125 Ala. 397, 27 So. 1016, 82 Am. St. Rep. 247 (1899).

*Arkansas.*—Bradford v. St. Louis I. M. & So. Ry. Co. (Ark.), 124 S. W. 516 (1910).

*Kentucky.*—Chiles v. Chesapeake & O. Ry. Co., 30 Ky. L. Rep. 1332, 101 S. W. 386, 11 L. R. A. (N. S.) 268 (1907).

*Michigan.*—Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62 (1858).

*Missouri.*—Chilton v. St. Louis &

the legislation in certain States which have provided by statute that separate accommodations may be, or shall be, furnished by the railroads to colored passengers which are equal to those furnished white passengers is constitutional, so far as its being due process of law is concerned.[1] But at all events, public carriers until they do furnish separate accommodations equal in comfort and safety to those furnished other travellers have no right to discriminate between passengers.[2]

**§ 567. Class distinctions.**

One who is engaged in public service cannot make a valid restriction of his service to certain classes of society. It is only as to innkeepers apparently that this general principle has ever been questioned. It is no doubt competent for an innkeeper to fix the character of his entertainment so high that his reasonable charges will shut

I. M. Ry. Co., 114 Mo. 88, 21 S. W. 458, 19 L. R. A. 269 (1892).

*North Carolina.*—Britton v. Atlanta & C. A. L. Ry. Co., 88 N. C. 536, 43 Am. Rep. 749 (1883).

*Pennsylvania.*—West Chester & Philadelphia R. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744 (1867).

*South Carolina.*—Smith v. Chamberlain, 38 S. C. 529, 17 S. E. 371, 19 L. R. A. 710 (1892), waiting rooms.

*Tennessee.*—Chesapeake, O. & S. W. R. R. Co. v. Wells, 85 Tenn. 613, 4 S. W. 5 (1887).

[1] *United States.*—Chesapeake & O. Ry. Co. v. Kentucky, 179 U. S. 388, 45 L. ed. 244, 21 Sup. Ct. 101 (1900); McGuinn v. Forbes, 37 Fed. 639 (1889).

*Florida.*—Croons v. Shadd, 51 Fla. 168, 40 So. 497 (1906).

*Kentucky.*—Louisville & N. R. R. Co. v. Catron, 102 Ky. 323, 43 S. W. 443 (1897).

*Louisiana.*—Ex parte Plessy, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639 (1893).

*Mississippi.*—Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 So. 203, 14 Am. St. Rep. 599 (1889).

*Tennessee.*—Smith v. State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432 (1888).

[2] *United States.*—Houck v. Southern Pacific R. R. Co., 38 Fed. 226 (1888).

*Illinois.*—Chicago & N. W. R. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641 (1870).

*Iowa.*—Coger v. North Western Union Packet Co., 37 Ia. 145 (1873).

*Texas.*—Pullman P. Car Co. v. Cain, 15 Tex. Civ. App. 503, 40 S. W. 220 (1897).

out all but wealthy or well-to-do patrons.[1] "He does not absolutely engage to receive every person who comes to his house, but only such as are capable of paying a compensation suitable to the accommodation provided." [2]

**§ 568. Social differences.**

But if a person applies for such accommodation and is prepared to pay the price demanded, the innkeeper could hardly refuse to receive the guest on the ground that he was a poor man, and ought not to afford such an entertainment. Yet Baron Parke [3] once said: "A man may keep an inn for those only who come in their own carriages." This doctrine is a very doubtful one; but it is doubtless competent for an innkeeper to entertain guests of different classes in different rooms or require them to eat at separate tables, provided each gets reasonable accommodations.[4]

**§ 569. Unpopular organizations.**

That there is a prejudice against the members of certain organizations in general cannot in accordance with these principles excuse the refusal of certain members of that organization. Thus there is in some communities a deplorable prejudice against social association with enlisted men in uniform; but this cannot justify their refusal. In a Maine case[5] this whole matter was threshed out in a case against an innkeeper who wanted to put in the defense, that others wearing the same uniform had earlier in the day acted in a disorderly manner in his house, but Emery, J., said: "These plaintiffs,

[1] Jaquet v. Edwards, 1 Jamaica, 4 (1867).

[2] Abbott, C. J., in Thompson v. Lacy, 3 B. & Ald. 283, 285 (1820).

[3] In Johnson v. Midland Ry. Co., 4 Exch. (Eng.) 367, 371 (1849).

[4] Regina v. Sprague, 63 J. P. 233 (Eng., 1899).

[5] Atwater v. Sawyer, 76 Me. 539, 49 Am. Rep. 634 (1884).

though members of the militia companies, were not of this disorderly party, nor with them. It is not claimed that the plaintiffs were otherwise than sober, orderly and respectable. The only connection shown between them and the disorderly ones was their membership of the same militia companies. It is not even shown they were of the same company. The only similarity in appearance was in the uniform. Such membership was honorable, and there was not in that any reasonable cause to believe the plaintiffs intended insult. The uniform was honorable and the rightful wearing it by the plaintiffs was no reasonable cause for apprehension of insult." [1]

**§ 570. Labor demands.**

A public servant owing a general duty to all men requiring his service cannot be permitted, if he would, to defer to the demands which the laboring class often makes upon the whole community in its labor disputes. Thus a railroad cannot refuse to take scab workmen to do their work against the violent protests of the union men, although the protection of such workmen as passengers may impose upon them unusual burdens. That the carrier must put forth extraordinary efforts in such emergencies is but part of the general duty to meet all contingencies with adequate service.[2] Thus a railroad cannot refuse to take freight from a boycotted line, even if its reception may involve a sympathetic strike on its own line.[3] As the court said in a case of this extreme sort:

[1] Rex v. Smith, 65 J. P. 521 (1901), *accord.*

[2] Chicago & A. R. R. Co. v. Pillsbury, 123 Ill. 9, 14 N. E. 22 (1827).

But see Pounder v. North E. Ry. Co., 1 Q. B. 385 (1891).

[3] The quotation is from Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481 (1888).

See also Toledo, A., A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387 (1893); and Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (1894).

"Now, the question is, what shall be obeyed,—the law of the land, or the order of the chiefs of the locomotive engineers? Shall a railway company refuse obedience to the express provisions of the statutory law because some of its employés threaten to quit its service, and thus stop the running of its trains?"

**§ 571. Assumption of peculiar risks.**

It is part of the business in public service to undertake in particular cases a service which will involve more risk than in the ordinary case. Thus in a recent Massachusetts case [1] it was held that a sender of a telegram might inform the company of the nature of the message and its importance from a financial point of view, so that the nature and particulars of the undertaking of the company may be understood by it. And consequently the telegraph company was held liable for refusing to take the message to which this notice was attached.[2]

**§ 572. Service involving unusual care.**

More familiar illustrations of this principle may be found in the law of the carriage of passengers. For example, a railroad cannot refuse to carry a blind man who can get about after a fashion. Thus in Lackery v. Mobile & Ohio Railroad Company [3] it was said: "It is not every sick or crippled or infirm person whom a railroad regulation can exclude, but one so sick or so crippled or so infirm as not to be able to travel without aid." Women and children, cripples and invalids, the halt and the blind—all have a right to travel. If they will put an outrageous burden upon the carrier in particular cases, that is a matter of excuse.[4]

[1] Vermilye v. Postal Telegraph Cable Co., 205 Mass. 298, 91 N. E. 904 (1910).

[2] See generally chapter XXIX.

[3] 75 Miss. 751, 23 So. 435, 41 L. R. A. 385, 65 Am. St. Rep. 617 (1898).

[4] See generally chapter XVIII.

**§ 573. Indirect advantage in refusing.**

A public servant or one representing him cannot refuse service for his own private advantage or for his own profit in an outside business. A plain example of this may be seen in a late case [1] where a telegraph operator refused to take a message complaining of his conduct. Another aggravated case was that of a railroad which refused to handle coal of a shipper because he would not sell it to a coal company of which an officer of the road was an officer. In granting a mandamus in that case Mr. Justice Dean said: "The public duty of defendant was to carry freight and passengers. Suppose it had refused to sell him a ticket as a passenger, and notified him that such refusal would be kept up unless he sold his coal to the president's coal company; the wrong would have been a violation of a duty which defendant owed to the general public and a common carrier of passengers, but it would also have been a wrong special to himself, distinct from the public of which he was one, and from which he alone specially suffered. It would have been a demand on him to do something having no connection with defendant's business of transportation, and, if he refused, to deprive him of a right which it had undertaken." [2]

**§ 574. Ultimate advantage in refusing.**

A public servant should not set himself up as the constituted arbiter of the economic advantage of the community he serves, even if it may be said that its own interests are bound upon those of the community. A railroad company, for example, could not, as one court pointed out,[3] refuse to handle the freights of a new dealer

[1] Western Union Telegraph Co. v. Lillard, 86 Ark. 208, 110 S. W. 1035 (1908).

[2] Loraine v. Pittsburg, J. E. & E. R. R. Co., 205 Pa. St. 132, 54 Atl. 580, 61 L. R. A. 502 (1903).

[3] Coe v. Louisville & Nashville R. R. Co., 3 Fed. 775 (1880).

upon the ground that the particular trade already had sufficient followers in that community, and was being over done to the detriment of all concerned. This was well brought out in a late case where a railroad had refused to accept coal for shipment from a mine on the ground that it was of such inferior quality to other coal shipped from the region over its line as to injuriously affect the sale, and subsequently the shipment of superior qualities of other mines. Here, obviously, the railroad assumed too much. That this sort of economic argument is out of place in legal discussion of plain breach of established duty is plain to all lawyers when outright refusal of service is in question; but later in this treatise it will be seen that in the making of relative rates for service, apparent discrimination is often justified upon the ground of general economic advantage.[1]

**§ 575. Particular service peculiarly expensive.**

Even in the extreme case where it is shown that in the particular case it will be unprofitable to serve the applicant in question as he desires, there is no excuse. For clearly it should be obvious that in a public employment all applicants must be served at established rates, even if in a particular case it is especially bothersome or even particularly expensive. Those who profess a public employment must fulfill their public duty to all who apply, and must realize that this will be more troublesome in some cases than in others; and indeed so long as the business as a whole is profitable they should not complain if some occasional services may result in loss. Thus a railroad cannot cancel a scheduled train because not enough business has appeared for it on a particular day to make it pay.[2] Nor can a telegraph company refuse to take a

[1] Beech Creek R. R. Co. v. Olanta Coal Mining Co., 158 Fed. 36, 85 C. C. A. 148 (1907).

[2] Kansas & A. V. Ry. Co. v. Ayres, 63 Ark. 331 (1897).

telegram which it is obvious it will not be profitable to handle under the circumstances.[1]

**§ 576. Extensions limited by profitableness.**

But although unprofitableness in a particular instance will not justify a refusal to act in accordance with the general obligation, general unprofitableness may excuse the failure to make further extension of the service in question. Particularly in those services where the general profession calls for the expansion of the facilities offered to meet increased demands, reasonable time is given. Two recent telephone cases throw light on this. In one[2] in approving the granting mandamus against a telephone company which had pleaded that its switch board was full, it was said that a reasonable time for the construction and installation of an enlargement should be allowed for. In the other[3] the court was more lenient still, holding that new trunk cables need not be installed so as to give one applicant a private line until other applications made such a considerable addition obligatory.

**§ 577. Service in unprofitable ways.**

As has been seen there may be upon proper announcement partial withdrawal from any separable branch of the service offered which is proving unprofitable unless a mandatory charter stands in the way.[4] But so long as public service is still professed in any branch it would seem that it was necessary to continue to give such service as the business in general, taken as a whole, really demands.[5] To a certain extent also the amount of serv-

[1] Western Union Telegraph Co. v. Matthews, 24 Ky. L. Rep. 3 (1902).

[2] State ex rel. v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870 (1901).

[3] Cumberland Tel. & Tel. Co. v. Kelly, 160 Fed. 316 (1908).

[4] See Railway Co. v. Smith, 60 Ark. 221, 29 S. W. 752 (1895).

[5] See Steenerson v. Great Northern Ry. Co., 69 Minn. 353 (1897).

ice that must be rendered depends upon the existing demand.

**§ 578. Unprofitableness seldom an excuse.**

However it does not follow at all that no more need be expended in performing a service than will be profitable. Thus a railroad cannot excuse itself from running separate trains for passengers by urging that it would not be sufficiently profitable. Passengers are entitled to appropriate service so long as passenger service is maintained.[1] Nor can a canal company allow a lateral which is unprofitable to fall into disrepair; if it is bound to maintain it, it must do so properly.[2]

**§ 579. Particular service not indispensable.**

It is not necessary that the breach shall be upon personal grounds. When service is refused for other motives than personal prejudice, there will be no defense unless there are sufficient public grounds to justify the refusal, whatever arguments might be urged otherwise. Thus the defense that the applicant has another service available will not prevail although public necessity is apparently not so strong in this case as in the typical case of virtual monopoly. Although there have been several cases in which this defense has been brought forward, it has failed in all. Thus an innkeeper cannot refer a traveler to other hotels, many of which are near by, because he does not wish to take him.[3] A gas company cannot refuse service to a householder upon its mains though another company with mains in that street is ready to supply him.[4]

[1] See People ex rel. v. St. Louis, A. & T. H. R. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656 (1898).

[2] See Savannah & O. Canal Co. v. Shuman, 91 Ga. 400, 17 S. E. 937, 44 Am. St. Rep. 43 (1893).

[3] See *dicta* in Lamond v. Richard 1 Q. B. 541 (1897).

[4] Portland Natural Gas & O. Co. v. State ex rel., 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639 (1893). See also Jones v. Rochester Gas & E.

**§ 580. Substitute for service available.**

Upon similar principles it has been held no defense to an express company's obligation to comply with the railroad commissioners' order that shippers of money could use the United States mails, and were therefore not prejudiced by the express company's rule, requiring presentation of money packages for shipment at unreasonable hours.[1] And of course a telephone company cannot refuse to give service to one still using another telephone system as the services are not fairly equivalent.[2] And generally speaking once the law has satisfied itself that a business is public in character, the invariable consequence follows that a universal duty is owed to its public notwithstanding occasional competition of a limited sort. Unless this were so, the applicant might be refused in turn by the few other services available, and be left unserved without remedy.

Co., 168 N. Y. 65, 60 N. E. 1044 (1901).

[1] Platt v. Le Cocq, 150 Fed. 391 (1906).

[1] State ex rel. v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139 (1901).

# CHAPTER XVII

## REFUSAL BECAUSE OF ILLEGALITY INVOLVED

590. Illegality involved in performing service.

*Topic A. Subservience to Governmental Authority*

591. Obedience to executive orders.
592. Subservience to military necessity.
593. Prohibitions in administrative regulations.
594. Obedience to legal processes.
595. Contravention of charter limitations.
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597. Statutes expressly controlling service.
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*Topic C. Service Promoting Illegal Transaction*

604. Participation in the illegality.
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609. Cases holding that rejection is at peril.

*Topic D. Proximity to the Illegality*

610. Service promoting the illegality.
611. Illegality prior to service.
612. Illegality subsequent to service.
613. Public policy the explanation.

**590. Illegality involved in performing service.**

The plainest basis for a refusal to render service is il-

legality. Where service of the sort asked, is plainly in the face of legal inhibitions, the propriety of the refusal is obvious. And, if in giving the service asked illegality of any kind would be directly abetted, the case is hardly less plain. Where, however, the matter involved is rather *contra bones mores* than prohibited by explicit law a doubtful problem arises. And where the illegality alleged is remote from the service requested, a still more difficult question is presented.

*Topic A. Subservience to Governmental Authority*

**§ 591. Obedience to executive orders.**

Subservience to executive orders constitutes the most obvious head of justification for refusal to serve. Thus military necessity might justify the declaration of an embargo, in which case a steamship line would be obliged to tie up its vessels and refuse further freight.[1] For like reasons it was held that the railroad would have an excuse for refusing to accept food stuffs tendered it without the transit permit which the military authorities had required should be obtained from them by the shipper.[2] What is true of martial authority within the belligerent's own territory is of course still more clear of military government over conquered territory, namely, that those engaged in any service in that territory are subservient to the order of the military arm in accepting business.

**§ 592. Subservience to military necessity.**

Martial law under our system of government depends always upon showing overruling necessity, and therefore supplants the civil authorities only so far as the necessities of the case dictate. If, therefore, the military au-

[1] See Palmer v. Lorillard, 16 Johns. 348 (1819).

[2] Illinois Central R. R. Co. v. Phelps, 4 Ill. App. 238 (1879); S. C. 94 Ill. 548 (1880).

ıorities forbid service, this constitutes an excuse for not ːcepting goods.[1] But where the military authorities ·e in control their interference justifies suspension of ıblic service only to the extent that their interruption ıuses delay. And so even if a railroad is subjected to ilitary supervision it is liable for delays caused by fail·e of the company to conduct its regular service so far ; it had power to do so.[2] Belligerency brings into play ıusual law. Thus the furtherance of trade between ıemies would be illegal.[3] And as contraband shipped y neutrals is subject to seizure, a carrier could refuse to ıdertake its transportation to a belligerent.[4]

**593. Prohibitions in administrative regulations.** It must be obvious that when the refusal to serve is .ade necessary by the governmental authority that there an excuse. An interesting case in point is Decker v. tchison, Topeka & Santa Fe Railroad Company.[5] The .aintiff was not given the transportation he demanded ɔon the morning in question because on the 16th day of ːptember, 1893, the defendant railroad company had ːscribed a certain rule for the government of its trains ıtering the Cherokee Outlet on the day of its opening ır settlement, providing that no train should enter said ıtlet within six hours of 12 o'clock noon of said day. [r. Justice Scott held this refusal under these circum-

[1] Illinois Central R. R. Co. v. ɔrnberger, 77 Ill. 457 (1875).

[2] Illinois Central R. R. Co. v. cClennan, 54 Ill. 58, 5 Am. Rep. (1870).

[3] Dunn v. Bucknall Bros., 2 . B. 614, 71 L. J. K. B. 963 902).

See Gay's Gold, 13 Wall. 358 871).

[4] See Farmers' L. & T. Co. v. Northern Pac. Ry. Co., 112 Fed. 829 (1902).

In Northern Pacific Ry. Co. v. American Trading Co., 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. 84 (1904), it was held that a collector could not legally refuse a clearance to a vessel bound to a port of a belligerent because it had on board articles contraband of war.

[5] 3 Okla. 553, 41 Pac. 610 (1895).

stances to be entirely justifiable; he said: "Had trains gone into the country prior to 12 o'clock, hundreds would have become violators of the law, no doubt, and, had the defendant in error permitted those already aboard when the trains arrived at the line to remain in the coaches, those waiting on the line to enter trains according to the order of the secretary of the interior and the rules prescribed by the company would have been placed at a disadvantage, and their rights under the law would have been unequal and prejudiced thereby."[1]

**§ 594. Obedience to legal processes.**

The same excuse results from obedience to the lawful commands of another of the great departments exercising governmental authority, the judiciary. Perhaps the plainest case of this justification is where an irrigation company [2] of which the service was asked, was under an injunction ordering it not to render such service. Plainly in such case it is a good defense that compliance with the request will involve the company in contempt of court.[3] But it is almost equally plain that common-law process should be respected.[4] Thus a carrier of goods could refuse to accept them if subject to attachment.[5]

**§ 595. Contravention of charter limitations.**

A public service company cannot be required to furnish a service which it is not authorized to perform.[6] Thus

[1] Query for the constitutionality of empowering the Secretary to establish quarantine lines. Illinois Central S. R. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. 153 (1906).

[2] Sample v. Fresno F. & Irrigation Co., 129 Cal. 222, 61 Pac. 1085 (1900).

[3] Nairin v. Kentucky Heating Co., 86 S. W. 676, 27 Ky. Law. Rep. 551 (1900).

[4] Indiana, I. & I. Ry. Co. v. Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. Rep. 264 (1898).

[5] Mitchell v. Kansas City, C. & S. Ry. Co., 116 Mo. App. 116, 90 S. W. 1164 (1906).

[6] People v. St. Louis & B. Electric Ry. Co., 122 Ill. App. 422 (1905).

t cannot be called upon to render any sort of service which t is not empowered to perform. In a recent case a peti-ioner sought to have an illuminating gas company which t had been shown in other litigation had only authority o supply heating gas.[1] Said the court: "Obviously, un-ess the defendant be shown to be exercising a public fran-hise in the vending of gas for lighting purposes, there s no more ground for injunction shown here than if he ad sought one to restrain Peaslee, Gaulbert & Co. from efusing to vend oil to him. But the petition on its face hows that, as to the sale of gas for lighting purposes, the lefendant was not only not exercising a public franchise, ut was, by the ordinance which permitted it to do busi-ess in Louisville at all, expressly forbidden to sell gas for ny other than heating purposes. The plaintiff is there-ore in the position of asking an injunction requiring the lefendant to violate an ordinance of the city."

**§ 596. Situation at expiration of franchise.**

The situation at the expiration of the franchise has al-eady been discussed. In a late case[2] a water company vas held justified in preparing to discontinue service, its ranchise having expired. The doctrine of the court is hus summarized in the headnote: "On the expiration of a vater company's franchise by limitation, the company's ight to operate its plant and use the streets of the city herefor ceased, and with it the right of the city to demand ervice. But where, after the expiration of a water com-any's franchise, it continued to operate its plant and ren-ler service to the public, it was bound during such period o perform the obligations growing out of such assumed uasi-public service, to the extent that it was required to upply water adequate to its reasonable capacity and at

[1] Nairin v. Kentucky Heating Co., 27 Ky. Law Rep. 551, 86 S. W. 576 (1900).

[2] Laighton v. Carthage, 175 Fed. 145 (1909).

reasonable rates, and to that extent it was subject to the jurisdiction of the courts to enforce its implied undertaking." [1]

*Topic B. Contravention of Statutory Provisions*

**§ 597. Statutes expressly controlling service.**

Wherever there is a statute directly applying to the service in question and expressly stating the conditions under which alone service can be given, there is of course a resulting excuse whenever a service is asked which comes within its prohibitions. A clear example may be drawn from the Federal statute where the number of passengers which a vessel may carry is regulated; under the provisions of this statute, the carrier would of course have an excuse for not accepting additional passengers who offer themselves after the vessel has its complement.[2] So if it is illegal for a railroad to let its cars stand in the street it can refuse to permit goods to be loaded upon that part of a spur which is laid through a street without liability for discrimination in so refusing.[3] Where an explicit ordinance of the Board of Health forbids the transportation of corpses except when accompanied by a person in charge having a transit permit containing specified information a railroad may refuse transportation when all of this information is not filled in.[4] And where a revenue law directed that a stamp should be affixed to a telegram it was held that a telegraph company could refuse to accept a telegram without a stamp.[5]

[1] To the same effect concerning a gas company, see East Ohio Gas Co. v. City of Akron, 81 Ohio St. 33 (1909).

[2] See The Charles Nelson, 149 Fed. 846 (1906).

[3] Louisville & N. R. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. Rep. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447 (1901).

[4] Lake Erie & W. R. R. Co. v. James, 10 Ind. App. 550, 38 N. E. 192 (1894).

[5] Western Union Telegraph Co. v. Waters, 139 Ala. 652, 36 So. 773 (1904).

**§ 598. The criminal law generally.**

Those who conduct a public service are not bound by their general obligation to serve all to abet criminals. One of the leading cases upon this question is Thurston v. Union Pacific Railroad Company,[1] where the question raised was whether the defendant railroad had the right to exclude a notorious gambler from its train. Judge Dillon said it was entirely justified. "The railway company is bound, as a common carrier, when not over-crowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times, or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for interfering with the proper regulations of the company, or for gambling in any form, or committing any crime; nor is it bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the State laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling and refusing to desist, they may be forcibly expelled." [2]

**§ 599. Sunday laws.**

Where the service in question is forbidden on Sunday, either by legislation applying generally, or by a specific statute dealing with the particular business, there is of course an excuse as a consequence. Thus a carrier may

[1] 4 Dillon (U. S.), 321, Fed. Cas. No. 14,019 (1877).

[2] So a pickpocket might be refused by a carrier, Coppin v. Braithwaite, 8 Jurist (Eng.), 875 (1844).

refuse to carry on Sunday [1] and need not even be prepared to carry even when necessity or charity is involved, so long as any statutory prohibition which applies to him remains.[2] Even if there is no statutory prohibition, the cases hold that it does not follow that the carrier is bound to transact business on that day unless he chooses to do so.[3] It is generally agreed that a carrier must promptly complete transportation already begun on Sunday; [4] and by a similar principle he must accept goods from a connecting carrier on Sunday. The law on this point has been elaborately worked out in relation to telegraphing. A telegraph company if open for business must receive on Sunday all messages which it may fairly be said it is a work of necessity or charity to handle.[5] But unless the circumstances have been explained to the operator so that the message bears on its face evidence of its special character, it may be refused as all commercial or

[1] Walsh v. Chicago, M. & St. P. Ry. Co., 42 Wis. 23, 24 Am. Rep. 376 (1877). As to the constitutionality of forbidding service on Sunday see Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. 1086 (1896).

[2] Horton v. Norwalk Tramway Co., 66 Conn. 272, 33 Atl. 914 (1895).

[3] Merchants' Wharfboat Assoc. v. Wood, 64 Miss. 661, 2 So. 76 (1887). But see Carroll v. Staten I. R. R. Co., 58 N. Y. 126 (1874), ferry should run Sunday.

And see as to holidays other than Sunday, Pennsylvania R. R. Co. v. Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443 (1903); Guinn v. W. St. L. & Pac. Ry. Co., 20 Mo. App. 453 (1886).

The same rule applies to telegraph companies. Western Union Telegraph Co. v. McLaurin, 70 Miss. 26, 13 So. 36 (1892).

[4] Philadelphia, W. & B. R. R. Co. v. Lehman, 56 Md. 209 (1881).

[5] *Alabama.*—Western Union Telegraph Co. v. Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23 (1890).

*Indiana.*—Western Union Telegraph Co. v. Yopst, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224 (1888).

*Mississippi.*—Western Union Telegraph Co. v. McLaurin, 70 Miss. 26, 13 So. 36 (1892).

*Missouri.*—Burnett v. Western Union Telegraph Co., 39 Mo. App. 599 (1890).

*South Carolina.*—Smith v. Western Union Telegraph Co., 72 S. C. 116, 51 S. E. 537 (1905).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Levy, 59 Tex. 542 (1883).

cial messages may.[1] As to the other services, there not as yet much authority. Some services it is generally greed should be open to the public on all days; inns [2] id canals[3] are examples to which a citation may be ven. And it is most obvious that in many other callings rvice should be given regardless of days, such is the perative necessity. Gas and electric supply, water id sewerage service, are plain examples of services where odern necessity overbears the Sunday policy.

**600. Liquor laws.**

Some difficult problems arise as to the duty of common carriers to transport liquors into prohibition territory. It is certain that if the delivery would involve ie carrier in an illegal transaction he may refuse to idertake it. In the leading case on this topic, State Goss [4] Mr. Justice Rowell said: "Although express mpanies are common carriers, and liable as such, yet ie law neither requires nor permits them to do illegal ts; and they are not bound to transport and deliver toxicating liquor or other commodities, if thereby they ould commit an offence or incur a penalty. They cant be allowed, any more than other people, knowingly id with impunity, to make themselves agents for others break the laws of the State." This is especially clear here the local legislation goes so far as to forbid the ansportation of intoxicating liquors.[5] The carrier may

[1] *Georgia.*—Western Union Telegraph Co. v. Hutcheson, 91 Ga. 252, S. E. 297 (1892).

*Indiana.*—Western Union Telegraph Co. v. Henley, 23 Ind. 14, 54 E. 775 (1899).

*Missouri.*—Burnett v. Western nion Telegraph Co., 39 Mo. App. 9 (1890).

[2] Rex v. Ivens, 7 C. & P. 213 835).

[3] McArthur v. Green Bay & Miss. Canal Co., 34 Wis. 139 (1874).

[4] 59 Vt. 266, 9 Atl. 829, 59 Am. St. Rep. 706 (1886).

[5] The carrier must make out the validity of such legislation at his peril. Adams Exp. Co. v. Commonwealth, 29 Ky. L. Rep. 224, 29 S. W. 932 (1906); Southern Express Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619 (1905).

then, of course, refuse to accept them;[1] and, moreover, as one case[2] holds, the carrier has discretionary power to determine whether the liquors offered are intoxicating in the sense of the law. But while the carrier is not liable as a violator of such statutes if he had no cause to know that he was transporting liquors,[3] he must act in good faith upon reasonable suspicions.[4] If the final selling only is illegal the carrier probably cannot refuse to bring liquors on the ground of the possibility that they might be resold illegally.[5] Thus, where the sale of liquor in original packages was lawful in South Carolina, though it was forbidden in any other form, the carrier could not refuse to receive liquor in the original packages for delivery in South Carolina.[6]

**§ 601. Game laws.**

Where it is made illegal by statute to transport game or fish, a carrier may refuse to accept such game or fish, if acceptance would promote the violation of the statute or impede its administration. But it will not itself be guilty of violating the act if it has in its possession such game or fish which it has received in packages in regular course without reasonable grounds of suspicion.[7] If in

[1] State legislation of this sort may be unconstitutional. American Exp. Co. v. Kentucky, 206 U. S. 139, 51 L. ed. 993, 27 Sup. Ct. 609 (1907); s. c., *sub nom.* American Exp. Co. v. Commonwealth, reversing 30 Ky. L. Rep. 207, 97 S. W. 807 (1906).

[2] Milwaukee M. E. Co. v. Chicago, R. I. & P. Ry. Co., 73 Ia. 98, 34 N. W. 761 (1887).

[3] Adams Exp. Co. v. Commonwealth, 33 Ky. L. Rep. 967, 112 S. W. 577 (1908).

[4] Brewing Co. v. Southern Exp. Co., 109 Va. 22, 63 S. E. 6 (1908).

[5] *United States.*—Crescent Liquor Co. v. Platt, 148 Fed. 894 (1906).

*Georgia.*—Southern Exp. Co. v. State, 107 Ga. 670, 33 S. E. 637, 73 Am. St. Rep. 146 (1899); Southern Exp. Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A. (N. S.) 619 (1905).

[6] Blumenthal v. Southern Ry. Co., 84 Fed. 920 (1898).

[7] State v. Swett, 87 Me. 99, 32 Atl. 806, 29 L. R. A. 714, 47 Am. St. Rep. 306 (1895).

ɔedience to orders of game inspectors or fish wardens it ɛlivers up such game or fish for seizure, it will have a ıfficient excuse; but no protection apparently if these ficers acted without authority of law.[1]

**602. Health regulations.**

Quarantine regulations duly established by law will ɔcuse a carrier from accepting passengers destined be-ɔnd the quarantine barriers which are set up against l passengers coming from a certain district to a certain strict,[2] or any passengers, association with whom would ɛtain other passengers;[3] and the same is true of freight ɡainst which quarantine is legally declared.[4] However, carrier who knows of the quarantine and accepts ıɜiness without disclosing it at the time of acceptance, ill be liable to his patrons[5] unless the quarantine is so ɔtorious that he may assume that it is known.[6] But is usually provided that under certain conditions certif-ates may be obtained, in which case they should be ıly notified.[7] Similar in character are those regula-ɔns providing that water shall not be turned on until ı officer of the Board of Health is satisfied as to the umbing arrangements.[8] And so if a Board of Health

[1] Merriman v. Great Northern ɔp. Co., 63 Minn. 543, 65 N. W. 80 (1896).

[2] A patron cannot maintain an ac-ɔn against a railroad company on ɜ ground that he was wrongfully pelled from its train, which he t, in obedience to the order of a arantine or health officer, before ıching his destination, the con-ctor pointing him out. Baldwin Seaboard Air Line Ry. Co., 58 S. 35, 128 Ga. 567 (1907).

[3] St. Clair v. Kansas City M. & B. R. R. Co., 77 Miss. 789, 28 So. 957 (1900).

[4] Fort Worth & D. C. Ry. Co. v. Masterson, 95 Tex. 262, 66 S. W. 833 (1902).

[5] Hasseltine v. Southern Ry. Co., 75 S. C. 141, 55 S. E. 142 (1906).

[6] St. Clair v. Kansas City, M. & B. R. R. Co., 76 Miss. 473, 24 So. 904, 71 Am. St. Rep. 534 (1899).

[7] St. Louis & S. F. Ry. Co. v. Roane, 93 Miss. 7, 46 So. 711 (1908)

[8] But see Johnson v. Belmar, 58 N. J. Eq. 354, 44 Atl. 166 (1899).

should close an inn, the proprietor would doubtless have an excuse for not entertaining guests.[1]

**§ 603. Gaming statutes.**

Gaming laws were involved in a notable case lately.[2] The New York police department had ordered a telephone instrument removed from certain premises, on the ground that pools were being sold there; and the telephone company had thereupon refused to reinstate the telephone in these premises for a new applicant without assurance as to his intentions accompanied by references as to his character. This attitude the court held justifiable: "Under the circumstances, this does not seem to us to have been an unreasonable requirement. The New York Telephone Company had been informed by the police department that the premises had been used as a pool room. It was also aware that a telephone which it had previously installed therein had been removed therefrom by the police. The officers of the company might not unreasonably apprehend that they would render themselves liable for aiding and abetting a violation of the law if they furnished further telephone service to the premises in view of this information.[3] It

[1] See Gilbert v. Hoffman, 66 Iowa, 205 (1885).

[2] Matter of Cullen, 106 N. Y. App. Div. 250, 94 N. Y. Supp. 290 (1905). In the leading case of Thurston v. Union Pacific R. R. Co., 4 Dillon (U. S.), 321, Fed. Cas. No. 14,019 (1877), it was held that one reason why the notorious gambler could be refused passage was that the company might make itself liable for maintaining premises for gambling.

[3] There are numerous cases excusing a telegraph company for refusing to give its service to "bucket shops" maintained in defiance of express statutes. See:

*United States.*—Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. 637 (1905); Bryant v. Western Union Telegraph Co., 17 Fed. 825 (1883); Sullivan v. Postal Telegraph Cable Co., 123 Fed. 411, 61 C. C. A. 1 (1903).

*Illinois.*—Central S. & G. Exch. v. Board of Trade, 196 Ill. 396, 63 N. E. 740 (1902).

*Indiana.*—Western Union Tele-

as quite proper, therefore, for them to request the surance from the appellant which the contracting ent suggested, and for them, also, to require the ap- llant to furnish a reference as to his character."

*Topic C. Service Promoting Illegal Transaction*

**604. Participation in the illegality.**

Of course one engaged in public employment should fuse to take any action which would make him liable r abetting illegality. Thus a carrier of passengers uld refuse to take upon the train one fleeing from stice, one going upon the train to assault a passenger, to commit larceny.[1] In an analogous case it was sumed that the carrier might refuse to take a rebel ficer going to the front to join his command.[2] But, if e carrier does not know of the illegal nature of the re- uest he is not legally liable to the owner for taking goods cording to his *prima facie* duty.[3] However, a railroad mpany which negligently permitted slaves to be trans- rted without the authority of their owner, was held ble for their value by reason of being concerned in eir escape.[4]

**605. Implication in illegality.**

Upon similar principles a telegraph company should

ph Co. v. State, 165 Ind. 492, 76 E. 100, 3 L. R. A. (N. S.) 153 05).

*Kentucky.*—Smith v. Western ion Telegraph Co., 84 Ky. 664, . W. 483 (1887). But see Louis- le v. Wehmhoff, 116 Ky. 812, 79 W. 201, 25 Ky. L. Rep. 1924 03).

*Ohio.*—Cain v. Western Union legraph Co., 18 Cinn. Wk. Bul. (1887).

*Pennsylvania.*—Sterrett v. Philadelphia Local Telegraph Co., 18 Wk. N. Cas. 77 (1886).

[1] See the *dicta* in Thurston v. Union Pac. Ry. Co., 4 Dill. (U. S.) 321 (1877).

[2] Turner v. North Carolina R. R. Co., 63 N. C. 522 (1869).

[3] Jackson v. Railway Co., 87 Mo. 422, 56 Am. Rep. 460 (1885).

[4] Louisville & N. R. R. Co. v. Young, 1 Bush (Ky.), 401 (1866).

refuse to transmit messages which would implicate it in illegality. While it is true there can be no discrimination where the business is lawful, no one can be compelled to aid unlawful undertakings in any way whatever.[1] "A telegraph company should refuse to send libelous [2] or obscene [3] messages, or those which clearly indicate the furtherance of an illegal act, or the perpetration of some crime. But recently in New York the telephone and telegraph instruments were taken out of 'pool rooms' which were used for the purpose of selling bets on horse races." [4] Thus a telegraph company will be liable for transmitting a forged message knowing it to be such; it is, therefore, its undoubted right to refuse unauthorized messages [5] since it might thereby become involved in the perpetration of frauds.[6]

**§ 606. Service aiding immoral business.**

There are several cases involving prostitution which test these principles, some of which have been mentioned.[7] In none of them is the general problem so well worked out as in a recent case [8] where a telephone company

[1] Quoted from Gray v. Western Union Telegraph Co., 87 Ga. 350, 13 S. E. 562 (1891).

[2] See Dominion Telegraph Co. v. Silver, 10 Can. Sup. Ct. 238 (1881).

[3] See Archambault v. Great North Western Telegraph Co., 14 Quebec, 8 (1886).

[4] See Matter of Cullen, 106 N. Y. App. Div. 250, 94 N. Y. Supp. 290 (1905), and other cases cited in § 603, *supra*.

[5] Western Union Telegraph Co. v. Totten, 141 Fed. 533, 72 C. C. A. 591 (1905).

[6] Bank of Havelock v. Western Union Telegraph Co., 141 Fed. 522, 72 C. C. A. 580 (1905).

[7] *United States.*—Brown v. Memphis & C. Ry. Co., 4 Fed. 37 (1880).

*Texas.*—Pullman Palace Car Co. v. Bales, 80 Tex. 211, 15 S. W. 785 (1891).

Unless these women notoriously habitually misconduct themselves.

*Iowa.*—Beeson v. Chicago, R. I. & Pac. Ry. Co., 62 Ia. 173, 17 N. W. 448 (1883).

*Washington.*—Stevenson v. West Seattle Land Co., 22 Wash. 84, 60 Pac. 51 (1900).

[8] Godwin v. Carolina Tel. & Tel. Co., 136 N. C. 258, 48 S. E. 636 (1904).

See, however, Western Union Telegraph Co. v. Ferguson, 57 Ind.

fused to give service to a bawdyhouse upon general inciples fully discussed. The opinion of Chief Justice lark is, therefore, well worth the quotations which fol- w. "It is argued that a common carrier would not be ıthorized to refuse to convey the plaintiff because she ɔeps a bawdyhouse. Nor is the defendant refusing her telephone on that ground, but because she wishes to ace the telephone in a bawdyhouse. A common car- ɔr could not be compelled to haul a car used for such ırpose. If the plaintiff wished to have the phone aced in some other house used by her, or even in a ɔuse where she resided, but not kept as a bawdyhouse, .e would not be debarred because she kept another ɔuse for such unlawful and disreputable purpose. It not her character, but the character of the business the house where it is sought to have the telephone aced, which required the court to refuse the mandamus. ı like manner, if a common carrier knew that passage ɜs sought by persons who are traveling for the execu- ɔn of an indictable offense, or a telegraph company .at a message was tendered for a like purpose, both ɔuld be justified in refusing; and certainly when the aintiff admits that she is carrying on a criminal busi- ɜss in the house where she seeks to have the telephone aced, the court will not, by its mandamus, require at facilities of a public nature be furnished to a house ed for that business. For like reason a mandamus .ll not lie to compel a water company to furnish water, a light company to supply light, to a house used for rrying on an illegal business. The courts will enjoin abate, not aid, a public nuisance."

**607. Service indispensable to illegal business.**

What surely may be refused upon general principles

5, in which it was held that a ssage sending for prostitutes might be refused but not an ambiguous one upon mere suspicion.

is a service which is necessary to the conduct of an illegal business. It would seem plain, for example, that a telegraph company is not obliged to furnish a service intimately connected with illegal operations. Where the running of a bucket shop is held an illegal business, it is therefore held in most cases that the telegraph company is not bound to furnish it with market reports,[1] either by virtue of its duties as a public servant to serve all customers without discrimination, or even by virtue of any contract which it may have entered into with such a subscriber as this. And so obedience to the regulation of an exchange designed to prevent such distribution of its quotations is held reasonable. "It is simply a restraint on the acquisition for illegal purposes of the fruits of the plaintiff's work," as the United States Supreme Court recently said.[2] Where the business is simply against public policy, the question is more difficult. The cases are somewhat divided as to whether a telegraph company can refuse to handle messages in relation to the sale of options or futures in jurisdictions where the law simply refuses to enforce such contracts as *contra bonos mores*. There are cases[3] which imply that the company is assuming too much in refusing to transmit such message, but by the weight of authority it is justi-

[1] *United States.*—Bryant v. Western Union Telegraph Co., 17 Fed. 825 (1883); Sullivan v. Postal Telegraph Cable Co., 123 Fed. 411, 61 C. C. A. 1 (1903).

*Illinois.*—Central S. & G. Exch. v. Board of Trade, 196 Ill. 396, 63 N. E. 740 (1902).

*Indiana.*—Western Union Telegraph Co. v. State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153 (1905).

*Kentucky.*—Smith v. Western Union Telegraph Co., 84 Ky. 664, 2 S. W. 487 (1887).

*Ohio.*—Cain v. Western Union Telegraph Co., 18 Cinn. Wk. Bull. 267 (1887).

*Pennsylvania.*—Sterrett v. Philadelphia Local Telegraph Co., 18 Wk. N. Cas. 77 (1886).

[2] *United States.*—Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. 637 (1905).

[3] Gray v. Western Union Tele-

ed.[1] These last cases seem to the writer fundamentally ght.

**608. Reasonable rejection usually justified.**

If as things appear to the company there is real danger ıat it will be involved in an illegal transaction if it ɜnders the service asked, it would seem that it should e justified in refusing to perform the service asked, lthough in fact there is no illegality on foot. The most ɜriking case of this sort was one against a sleeping car ɔmpany.[2] Husband and wife had dealt separately with ıe company, procuring different berths, and late at ight the wife went to the husband's berth clandestinely. t was finally held that the company was justified in ɛfusing to permit them to occupy the berth together ıat night. "It may be admitted," said the upper ɔurt, "that there was nothing improper in the conduct f the plaintiff and his wife, when their relationship to ıch other is considered. And yet it cannot be affirmed ıat their actions were not under the circumstances ılculated to excite the suspicion and arouse the vigilance f defendant's servants." In what is probably the lead-ıg case [3] on this point where the exclusion of a notorious

aph Co., 87 Ga. 350, 13 S. E. 562, L. R. A. 95, 27 Am. St. Rep. 259 891). And see Western Union elegraph Co. v. Hill (Tex. Civ. pp.), 65 S. W. 1123 (1902).

[1] Gist v. Telegraph Co., 45 S. C. 4, 23 S. E. 143 (1895). And see estern Union Telegraph Co. v. arper, 15 Tex. Civ. App. 37, 39 W. 599 (1896).

[2] Pullman Palace Car Co. v. ales, 80 Tex. 211, 14 S. W. 855, 15 W. 785 (1891).

See also Matter of Cullen, 106 . Y. App. Div. 250, 94 N. Y. Supp. 290 (1905), holding that a telegraph company may insist upon reasonable assurances that its news service is not wanted for use in an illegal business, by the successor of a person who had run a bucket shop at these premises.

So a pickpocket may be refused transportation as is said in a case which holds that if he is accepted he cannot afterwards be ejected. Coppin v. Braithwaite, 8 Jurist, 875 (1844). *Sed quære* as to the actual decision.

[3] Thurston v. Union Pac. R. R.

gambler from a passenger train was justified the general principle was thus stated by the court. "Whether the plaintiff was going upon the train for gambling purposes, or whether, from his previous course, the defendant might reasonably infer that such was his purpose, is a question of fact for the jury."

**§ 609. Cases holding that rejection is at peril.**

There are, however, cases which hold that refusal is always made at peril of mistake as to the true conditions; for it is said unequivocally that proper applicants can never be refused. Thus in an early telegraph case [1] where it was admitted that the telegraph company had ground to believe that the message refused— "Send me four girls on first train to Francesville to tend fair,"— was addressed by a keeper of prostitutes to a procurer of such women, the court held that the telegraph company could not refuse the message upon mere suspicion. And in another telegraph case [2] it was held that the company could not justify itself for its default in handling the message in question on the ground that it believed that the message was being sent to direct an illegal operation in stocks. It is submitted that both of these decisions are erroneous.

*Topic D. Proximity to the Illegality*

**§ 610. Service promoting the illegality.**

In the cases which have been discussed in the preceding paragraphs the service asked might fairly be said to promote the illegality directly. In such cases the policy justifying refusal is sufficiently plain. But when the

Co., 4 Dillon (U. S.), 321, Fed. Cas. No. 14,019 (1877).

[1] Western Union Telegraph Co. v. Ferguson, 57 Ind. 495 (1877).

[2] Gray v. Western Union Telegraph Co., 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95 (1891).

ɛgality is far remote from the service asked it was ɜumed that the request cannot be refused. Thus, illustrate this distinction, innkeepers can refuse to ɪrbor an immoral woman who is entertaining her comnions in her rooms.[1] But a railroad cannot refuse transport a prostitute to a new field.[2] To make another ɜtinction, it has been held that a carrier could refuse take money intended for use in the contraband trade[3] ıile, as has been said, it might be obliged to transport bundle of stationery intended by the consignee for e in his business of dealing in futures.[4] This last point interesting as it shows another aspect of this principle. hen the business which will be aided is illegal in a gh degree it taints transactions much removed from it, ıt where the business is simply against public policy e taint does not even touch collateral transactions. ɔr example, a carrier cannot refuse to accept goods r transportation even if it is known that the owner tends to dispose of them on Sunday;[5] but it would ɜm that a carrier might refuse to bring firearms into district where mob violence prevailed.[6]

**511. Illegality prior to service.**

Whatever illegality there may have been, previous to e time when the service is requested, should not affect e right to have present service if the illegal conduct s ceased to operate. Thus where a man who had ought a prostitute to an inn remained after the woman

[1] See Curtis v. Murphy, 63 Wis. 22 N. W. 825, 53 Am. Rep. 242 85).

[2] Brown v. Memphis & C. R. Co., 'ed. 37 (1880).

[3] Cantu v. Bennett, 39 Tex. 303 73).

[4] Gray v. Western Union Telegraph Co., 87 Ga. 350, 13 S. E. 562, 14 L. R. A. 95 (1891).

[5] Waters v. Railroad Co., 110 N. C. 338, 14 S. E. 802, 16 L. R. A. 834 (1892).

[6] See, however, Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476 (1892).

had left the inn, and lost his goods, it was held that he might recover from the innkeeper. Even assuming that such misconduct would have barred him while the misconduct continued, the loss here happened after his misconduct ceased, and his previous immorality could not affect his subsequent status as a guest.[1] On the same principle, in a case where it appeared that the defendant was received at the inn on Sunday, and that to reach the inn on that day he had broken the statute which forbade traveling on Sunday, he was held to be a guest nevertheless, since the relationship was established by acts not necessarily connected with traveling on Sunday.[2] That the guest had been long a prize fighter, most of his battles being in violation of law, it would seem should not justify refusing to entertain him.[3] Even a man with a jail record has a right to travel.[4]

**§ 612. Illegality subsequent to service.**

To go to the other extreme it makes no difference to the right to service that illegal conduct may happen after the service is complete, provided that such conduct will be really independent of the service asked. Thus a railroad cannot excuse itself for failure to transport liquor by showing that the consignee may probably resell it in violation of the prohibition law.[5] It is no excuse that a passenger may get into trouble upon her arrival at her destination, it being usual for her to get intoxicated there.[6] This is not so plain upon the authori-

[1] Lucia v. Omel, 46 N. Y. App. Div. 200 (1899), affirmed in 53 N. Y. App. Div. 641 (1900).

[2] Cox v. Cook, 14 Allen (Mass.) 165 (1867).

[3] But see Nelson v. Boldt, 180 Fed. 779 (1910), going too far against the applicant.

[4] And see Prendergast v. Compton, 8 C. & P. 654 (1837), going too far in favor of the applicant.

[5] Southern Express Co. v. State, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146 (1899).

[6] Stevenson v. West Seattle Land & Imp. Co., 22 Wash. 84, 60 Pac. 51 (1900).

es as it seems it ought to be. In one early leading case seems to have been held that a competitor might be ɨfused transportation to a point where he intended to ɪke return passage for the purpose of soliciting business ı violation of proper regulations.[1] In a later case[2] ıuch cited, it was said that a passenger who had been anished by the vigilance committee might be refused ·ansportation back to San Francisco where a violent ıte probably awaited him. But there are additional lements in each of these cases.

**613. Public policy the explanation.**

It will have been noted throughout this chapter, that ıis excuse which one engaged in public service has by ɜason of illegality, is not confined to those obvious ases where rendering the service would subject the roprietor to legal proceedings as a participant in the legality. The defense is plainly wider, it justifies the roprietor in refusing to render a service which would romote illegality although he might not be liable personlly to legal proceedings, if he should render the service ı question. Considered broadly, then, the defense is ather the general one of public policy than a particular ne of illegality. Upon the whole it would seem to be lear that the law relating to the various matters disussed in this chapter is being worked out very well, : one may judge it by the closest analogy in established ɜw. The true extent of public duty depends in last nalysis upon public policy just as does the real extent f contractual obligation. Whatever policy is strong nough to excuse one from the performance of a conɾact obligation ought surely to justify one in refusing o perform this common-law obligation.

[1] Jencks v. Coleman, 2 Sumn. 221 (1835).

[2] Pearson v. Duane, 4 Wall. (U. S.) 605, discussed 18 L. ed. 447 (1866).

# CHAPTER XVIII

## REJECTION FOR PERSONAL DISQUALIFICATION

§ 620. Right of protection the basis of the defense.

*Topic A. Self-Protection*

§ 621. Dangerous service.
622. Risk of possible liability.
623. Fraudulent customers.
624. Abuse of privileges.
625. Interference with the service.
626. Persons bringing dangerous things.

*Topic B. Protection of Others Served*

§ 627. Dangerous persons.
628. Suspected criminals.
629. Violent passengers.
630. Disorderly guests.
631. Persons having contagious disease.
632. Intoxicated persons
633. Profane patrons.
634. Ejection governed by same general principles as rejection.

*Topic C. Applicant Under Disability*

§ 635. Disabled persons in general.
636. Persons subject to an incapacity.
637. Blind persons.
638. Sick persons.
639. Insane persons.
640. Arrested persons.

*Topic D. Basis for Rejection*

§ 641. Rejection for present misconduct.
642. Rejection for past misconduct.
643. Rejection upon probable cause.
644. Ejection before actual misconduct.
645. Whether refusal should be at peril.
646. Rejection for misconduct of companion.

**620. Right of protection the basis of the defense.**

For the protection of others being served as well as or the protection of its own interests, an applicant for ervice who will endanger person or property may be re-ected at the outset, or ejected afterwards. Thus one vho is attacking another passenger may be ejected by he carrier,[1] principally, of course, for the protection of he others then receiving service. But even if no guests hould happen to be present, for his own protection the nnkeeper may refuse to take in one who has attempted o break down his door.[2] This duty and right to pro-ect combined calls upon the carrier or the innkeeper o use due diligence and good faith. If, therefore, they act easonably and honestly it would seem that they make ut their justification in all cases.

*Topic A. Self-Protection*

**621. Dangerous service.**

It requires no argument to establish the justification f self-protection. A carrier of goods may refuse freight hich would injure his vehicle, or his employés. Thus e may refuse high explosives,[3] at least as ordinary reight, or tainting liquids,[4] particularly when contained n leaking barrels,—to cite two examples. Another way f explaining his right to refuse goods under such cir-umstances would be to say that if he took such freight ith knowledge, or even with reasonable suspicion, and njuries subsequently followed, to other persons or other

[1] Louisville & N. R. R. Co. v. ogan, 88 Ky. 232, 10 S. W. 655, 21 m. St. Rep. 332, 3 L. R. A. 80 889).

See generally this chapter.

[2] Goodenow v. Travis, 3 Johns. N. Y.) 427 (1808).

See generally chapter XXVII.

[3] Nitroglycerine Case, 15 Wall. (U. S.) 524, 21 L. ed. 206 (1872).

See Boston & Albany R. R. Co. v. Shanly, 107 Mass. 568 (1871).

[4] The Montana, 22 Fed. 715 (1884).

property, he might be held liable, and, therefore, he might well refuse to put himself in a position where such liability might be attributed to him. It may be added that a carrier is not necessarily under liability when he does take such goods, unless he is blameworthy,[1] or should have his suspicions as to what the packages contain.[2]

**§ 622. Risk of possible liability.**

Similarly an electric company could refuse to make connections with a building improperly wired, upon the ground of their possible liability for explosion or fire.[3] Indeed, it was recently held,[4] that a gas company could refuse to supply a house improperly piped by reason of the danger that if an explosion should occur they might be charged with liability. This is perhaps the best basis for those cases previously discussed where it was held that a service company might make installation according to certain rules or equipment within certain specifications, conditions precedent. Such regulation may thus be defended. To recall one example, there is the case where a water company was allowed to refuse to supply a house unless a certificate from a reputable plumber were produced.[5] And to cite another instance, a gas company was held entitled to regulate the installation of governors.[6]

**§ 623. Fraudulent customers.**

For its own protection also, one engaged in public em-

[1] See Farrant v. Barnes, 11 C. B. (N. S.) 553 (1856).

[2] But see Norfolk & Western R. R. Co. v. Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110 (1888).

[3] Benson v. American Illuminating Co., 102 N. Y. Supp. 206 (1907).

[4] Bastain v. Keystone Gas Co., 50 N. Y. Supp. 537, 27 App. Div. 584 (1898).

[5] State v. New Orleans Gas Light Co., 108 La. 67, 32 So. Rep. 179 (1902).

But see Franke v. Paducah Water Supply Co., 88 Ky. 467, 11 S. W. 432, 4 L. R. A. 265 (1889).

[6] Foster v. Gas Works of Philadelphia, 12 Phila. 511 (1878).

See also Blondell v. Consolidated Gas Co., 89 Md. 732, 43 Atl. 817 (1899).

oyment may refuse to serve those who design to defraud m, or who are actually engaged in defrauding him. Thus carrier of passengers may eject those attempting to at their way;[1] and a carrier of freight does not owe s special duties to those who have concealed valuable oods bearing a higher rate of freight in deceptive packges.[2] An innkeeper likewise owes no duty, as such, to ose who are imposing upon him.[3] One who is engaged a scheme of defrauding a supply company as by tapping e mains, or by tampering with the meter, cannot comain if his service is cut off.[4]

**624. Abuse of privileges.**

A customer who abuses his privileges in getting service ay be refused further service on that ground. A passen-

[1] See among the many cases to is effect:

*Illinois.*—Chicago, B. & Q. R. R. . v. Mehlsack, 131 Ill. 61, 22 N. 812, 19 Am. St. Rep. 17 (1889).

*Iowa.*—Way v. Chicago, R. I. & c. Ry. Co., 64 Ia. 48, 19 N. W. 8, 52 Am. Rep. 431 (1884).

*Kansas.*—Union Pac. Ry. Co. v. chols, 8 Kan. 505, 12 Am. Rep. 5 (1871).

*Maryland.*—State v. Baltimore & R. R. Co., 24 Md. 84, 87 Am. c. 600 (1865).

*Massachusetts.*—Planz v. Boston Albany R. R. Co., 157 Mass. 377, N. E. 356, 17 L. R. A. 835 392).

*Missouri.*—Muehlhausen v. St. uis R. R. Co., 91 Mo. 332, 2 S. W. 5 (1886).

*Montana.*—Higley v. Gilmer, 3 ont. 90, 35 Am. Rep. 450 (1878).

*New York.*—Barry v. Union Ry., 5 N. Y. App. Div. 520, 94 N. Y. pp. 449 (1905).

*England.*—Great Northern Ry. Co. v. Harrison, 10 Exch. Rep. 376 (1854).

[2] See among the many cases to this effect:

*Georgia.*—Southern Express Co. v. Everett, 37 Ga. 688 (1868).

*Illinois.*—Chicago & A. R. R. Co. v. Thompson, 19 Ill. 578 (1858); Chicago & A. R. R. Co. v. Shea, 66 Ill. 471 (1873).

*New York.*—Warner v. Western Trans. Co., 5 Robt. 490 (1868).

*England.*—Batson v. Donovan, 4 B. & Ald. 21 (1820); Gibbon v. Paynton, 4 Burr. 2298 (1769); Bradley v. Waterhouse, 3 C. & P. 318 (1828).

[3] Curtis v. Murphy, 63 Wis. 4, 22 N. W. 825, 53 Am. Rep. 242 (1885).

[4] Reasonable suspicion that the consumer is taking water surreptitiously is sufficient ground for taking action. Krumenaker v. Dougherty, 77 N. Y. Supp. 467, 74 App. Div. 452 (1902).

ger in a sleeping car is responsible for decent care of his berth.[1] Where water is supplied upon tap basis, a water company may refuse to continue serving one who wantonly wastes water.[2] One who permits unauthorized access to his telephone in contravention of the basis upon which service is rendered, may be refused further service,[3] And one who resells his ticker quotations may be cut off instantly.[4]

**§ 625. Interference with the service.**

It is obvious that in general those who interfere with the service as arranged may be refused service. Thus as a telephone company undertakes to provide all the apparatus necessary for its service, it may positively forbid any interference with the instruments. As one case held [5] it can prevent a subscriber from attaching to his instrument his own wires for an extension service in some other part of the building. It is justification enough for this regulation that the company may protect its circuit from possible interference. Again, a telephone company may cut out a subscriber who persists in breaking in upon a party line when others are using it.[6] The proper maintenance of the whole service demands that those who thus interrupt others who are using the wires shall be summarily dealt with.

[1] Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. Rep. 688 (1883).

[2] Harbison v. Knoxville Water Co. (Tenn.), 53 S. W. 993 (1899).

Robbins v. Bangor Ry. & Elec. Co., 100 Me. 496, 62 Atl. 136 (1905), *accord.*

[3] See People v. Hudson River Telephone Co., 19 Abb. N. C. 466 (1887).

[4] Shepard v. Gold & S. & Telegraph Co., 38 Hun (N. Y.), 338 (1885).

And see National Tel. News Co. v. Western Union Telegraph Co., 119 Fed. 294, 55 C. C. A. 198 (1902).

[5] Gardner v. Providence Telephone Co., 23 R. I. 312, 50 Atl. 1014 (1901).

[6] Huffman v. Marcy Mutual Telephone Co., 143 Ia. 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010 (1909).

**626. Persons bringing dangerous things.**

A carrier is justified in excluding from the vehicle any erson who insists upon bringing into it articles that are angerous to the carrier, or obnoxious to other passengers. 'hus, those may be refused entrance to a boat who have ith them guns with bayonets.[1] One who has valises hich will block the aisles may be ordered from a car.[2] nd one may be forbidden entrance who is trying to bring umbrous parcels into a street car.[3] For the same reason rule is proper and legal which excludes from a passenger ar a person accompanied by a dog.[4] And plainly a pas-enger cannot insist upon entering a street car accompanied y a goat.[5] Upon like principles an innkeeper may re-ıse to accept a guest bringing a large dog although he ad him on a leash.[6] A street car conductor may order workman with heavy tools to go upon the platform.[7] ut a street car company must permit a passenger to arry in the car a cake of ice securely wrapped.[8]

*Topic B. Protection of Others Served*

**627. Dangerous persons.**

The right of a common carrier of passengers or of a

[1] Flint v. Transportation Co., 6 latch. 158, Fed. Cas. No. 4873, 34 onn. 554, (1868).

[2] Chicago & A. R. R. Co. v. uckmaster, 74 Ill. App. 575 (1897).

[3] Dowd v. Albany Ry. Co., 47 . Y. App. Div. 202, 62 N. Y. ıpp. 179 (1900). See also Ray v. nited Traction Co., 96 N. Y. App. iv. 48, 89 N. Y. Supp. 49 (1904).

[4] Gregory v. Chicago & N. W. y. Co., 100 Iowa, 345, 69 N. W. 2 (1896). See further, Wescott v. attle, R. & S. Ry. Co., 84 Pac. 8, 41 Wash. 618, 4 L. R. A. (N. ) 947 (1906.)

[5] Daniel v. North Jersey St. Ry. Co., 64 N. J. Law, 603, 46 Atl. 625 (1900).

[6] Regina v. Rymer, 2 Q. B. D. 136 (1877).

[7] See Mittleman v. Philadelphia R. T. Co., 70 Atl. 828, 18 L. R. A. (N. S.) 503, 221 Pa. 485 (1908). But the train men cannot throw his tools off the cars. Smith v. Atchison, T. & S. F. Ry. Co., 112 Mo. App. 85, 97 S. W. 1007 (1907).

[8] McIntosh v. Augusta & A. Ry. Co. (S. C)., 69 S. E. 159 (1910). See also Runyan v. Central R. R.

public innkeeper to exclude or reject applicants who openly threaten violence to the other patrons then being served is perhaps too plain to require explanation. This explanation is plainly to be seen in the law making the proprietors of those services in which the patrons are taken in charge liable for not exercising due care in protecting their patrons not merely from actual assault and fear of injury, but from insult and shock. So it is easy to understand why the law not only justifies the proprietors of such services in refusing to serve such persons as are openly threatening injury to others being served, but in refusing to accept such persons as it is reasonable to suppose may do injury to others. If they are liable for not taking all reasonable steps to protect their patrons, they should certainly have the right not merely to reject those who it is reasonable to suppose might injure their patrons, but also to eject those already accepted who it is reasonable to suppose may injure their patrons. As Judge Dillon said in one of the leading cases [1] on this branch of the law of carriers, a railroad is not bound to receive on its cars or to permit to remain upon its cars one going upon a train or staying upon it to assault a passenger, commit larceny or robbery, or perpetrating any other crime.[2]

**§ 628. Suspected criminals.**

The right of an innkeeper to exclude those who are actually dangerous to the others who are being served at the same time may seem to be obvious. The plainest case of this excuse is the rejection of evil-disposed persons who might prey upon the persons whom the proprietor

Co., 65 N. J. L. 228, 47 Atl. 422 (1900).

[1] Thurston v. Union Pacific Ry. Co., 4 Dillon (U. S.), 321, Fed. Cas. No. 14,019 (1877).

[2] So a pickpocket may be rejected as is held in a case which (wrongly as it seems) holds that he may not be ejected. Coppin v. Braithwaite, 8 Jurist (Eng.), 875 (1844).

s bound to protect. As Judge Parsons said in one of the earliest American cases discussing the right of the innkeeper [1] to exclude dangerous persons: "Where is the distinction to be drawn? If one may enter the inn and carry there, all may. The pickpocket, the burglar, gambler and horse thief, can come and take his seat by the side of the most virtuous man in the community in the gentleman's common parlor at the hotel, and the proprietor cannot eject him (no matter how annoying it may be to the guest) without being indicted for an assault and battery. Nor would the line of distinction be drawn here—the filthy and unclean would claim the same right. It is only necessary to state such a proposition to show its absurdity." [2]

**§ 629. Violent passengers.**

That violent persons may be excluded from a common service would seem to be obvious. This is particularly plain when the person in question is actually threatening an assault. In one of the leading cases of this sort,[3] where the passenger ejected drew a knife the Court of Appeals of Kentucky held the railroad justified in putting him off, giving a full review of the various points usually involved in such cases. "The law makes it the duty of a railroad company to use all reasonable care in operating trains for both the safety and protection from molestation and insult of passengers; otherwise elderly and infirm persons and females, who, upon the faith of such protection, frequently travel unattended, would have no security against turbulent, bad men. And as

[1] Commonwealth v. Mitchel, 2 Parsons (Pa.), 431 (1850).

[2] The same points are made in a still earlier case as to the duties of innkeepers. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837).

[3] Louisville & N. Ry. Co. v. Logan, 88 Ky. 232, 10 S. W. 655, 21 Am. St. Rep. 332, 3 L. R. A. 80 (1889).

it is obvious a train must be run with skill and system in order to assure safety and comfort, the conduct of anyone who interferes with the management, or without just cause attempts to do bodily injury to, or put in fear, those in charge, is reprehensible, and unlawful." [1]

**§ 630. Disorderly guests.**

If the guest after being received misconducts himself so as to annoy the other guests, he may for that cause be ejected from the inn.[2] "If a man comes into a public house and conducts himself in a disorderly manner, and the landlord requests him to go out, and he will not, the landlord may turn him out. There is no doubt that a landlord may turn out a person who is making a disturbance in a public house, though such disturbance does not amount to a breach of the peace." [3] Thus one could be kept out who came avowedly to assault a guest.[4] And if one who has gained admission commits violence he may be treated as a trespasser *ab initio*.[5]

**§ 631. Persons having contagious disease.**

For the protection of all concerned the right is obvious also to exclude those having a contagious disease, or who are in loathsome condition. It is well established that a carrier of passengers may refuse to carry any persons in this condition, even if they have bought tickets.[6] And

[1] See also to the same effect:

*Kansas.*—Atchison, T. & S. F. R. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543 (1885).

*Missouri.*—Leonard v. St. Louis Transit Co., 115 Mo. App. 349, 91 S. W. 452 (1905).

*Ohio.*—Scioto Valley Traction Co. v. Graybill, 29 Ohio Cir. Ct. (1906).

*Texas.*—Atchison, T. & S. F. Ry. Co. v. Wood (Tex. Civ. App.), 77 S. W. 964 (1903).

[2] The quotation which follows is from Parke, B., in Howell v. Jackson, 6 Car. & P. (Eng.) 723, 725 (1834).

[3] See also Goodenow v. Travis, 3 Johns. (N. Y.) 427 (1808).

[4] See Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837).

[5] The Six Carpenters' Case, 8 Coke, 146*a* (1610).

[6] See *dicta* in Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7258 (1835), and in Thurston v. Union

, he may eject them after acceptance as passengers when ıe occasion arises.[1] Upon similar principles, an inn-ɜeper may plainly refuse entertainment to a person ith contagious disease.[2] "Where a guest is taken ill ; a hotel with a contagious disease, likely to be communi-ıted to others, the proprietor, after notifying the sick ıest to leave, has the right to remove such guest in a ıreful and becoming manner, and at an appropriate ɔur,[3] to some hospital or other place of safety, provided ıe life of the guest be not imperilled thereby. This is ɔt only a right inherent in the hotel keeper, but a duty ving to other guests, and to the preservation of public ɜalth." [4] This reasoning was followed in a recent case here it was held that a sleeping car company might under roper conditions exclude passengers apparently suffering om contagious disease from its cars to avoid the danger ıey cause to other passengers.[5]

**632. Intoxicated persons.**

According to the general principles governing the proper ɔnduct of a public service, it would seem plain that a ırrier is justified in refusing to transport an intoxicated

ıcific R. R. Co., 4 Dill. (U. S.), 1, Fed. Cas. No. 14,019 (1877).

[1] *United States.*—Paddock v. At-ison, T. & S. F. R. R. Co., 37 d. 841 (1889).

*Louisiana.*—Conolly v. Crescent ty R. R. Co., 41 La. Ann. 57, 5 . 259, 6 So. 526, 3 L. R. A. 133, 17 n. St. Rep. 389 (1889).

*Massachusetts.*—Connors v. Cu-rd S. S. Co., 204 Mass. 310, 90 . E. 601 (1910), *semble.*

*Minnesota.*—Croom v. Chicago, . & St. P. Ry. Co., 52 Minn. 296, N. W. 1128, 18 L. R. A. 602, 38 n. St. Rep. 557 (1893), *semble.*

[2] See *dicta* in Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209 (1837).

See also what is said in State v. Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516 (1890).

[3] McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 291, 39 Am. St. Rep. 699, 34 Wkly. Notes Cas. 33 (1894).

[4] McAdam, C. J., charging jury in Levy v. Corey, 1 City Ct. Rep. Supp. 57 (1884).

[5] Pullman Co. v. Krauss, 145 Ala. 395, 40 So. 398 (1906).

person. Those who are engaged in serving the public may well justify themselves for refusing to serve persons so intoxicated as to be dangerous or obnoxious to the proprietors of the service or to the others who are being served at the same time. Such persons are apt to be dangerous and likely to be unruly. If they are really intoxicated it would seem plain that they may be rejected.[1] And it seems equally clear that if they are really obnoxious they may be ejected.[2] Upon both points there is a considerable body of authority, although there is now little

[1] *United States.*—Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7258 (1835).

*Arkansas.*—Price v. St. Louis, I. M. & S. Ry. Co., 75 Ark. 479, 88 S. W. 575, 112 Am. St. Rep. 79 (1905).

*Indiana.*—Pittsburg, C. & St. L. Ry. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68 (1877).

*Kentucky.*—Louisville & E. Ry. Co. v. McNally, 31 Ky. L. Rep. 1357, 105 S. W. 124 (1907).

*Minnesota.*—Harrold v. Winona & St. P. Ry. Co., 47 Minn. 17, 49 N. W. 389 (1891), *semble.*

*New York.*—Freedon v. N. Y. Central & H. R. R. R. Co., 24 App. Div. 306, 48 N. Y. Supp. 584 (1897).

*North Carolina.*—Story v. Norfolk & S. R. R. Co., 133 N. C. 59, 45 S. E. 349 (1903).

*Pennsylvania.*—Pittsburg & C. Ry. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424 (1874).

*Texas.*—Paris & G. N. Ry. Co. v. Robinson (Tex. Civ. App.), 114 S. W. 658 (1909).

*Washington.*—Stevenson v. West Seattle Land & Improvement Co., 22 Wash. 84, 60 Pac. 51 (1900).

[2] *Alabama.*—Johnson v. Louisville & N. R. R. Co., 104 Ala. 241, 16 So. 75, 53 Am. St. Rep. 39 (1893).

*District of Columbia.*—Converse v. Washington & G. R. R. Co., 2 MacAr. 504 (1876).

*Georgia.*—Peavy v. Georgia R. R. & Banking Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334 (1888).

*Illinois.*—Chicago City Ry. Co. v. Pelletier, 134 Ill. 120, 24 N. E. 770 (1890).

*Kentucky.*—Chesapeake & O. Ry. Co. v. Saulsberry, 112 Ky. 915, 66 S. W. 1051, 112 Ky. 915, 23 Ky. L. Rep. 2341, 56 L. R. A. 580 (1902).

*Maine.*—Robinson v. Rockland, T. & C. St. Ry. Co., 87 Me. 387, 32 Atl. 994, 29 L. R. A. 530 (1895).

*Massachusetts.*—Hudson v. Lynn & Boston R. R. Co., 178 Mass. 64, 59 N. E. 647 (1901).

*New Hampshire.*—Edgerly v. Union St. Ry. Co., 67 N. H. 312, 36 Atl. 558 (1892).

*Texas.*—Missouri Pac. Ry. Co. v. Evans, 71 Tex. 361, 9 S. W. 325, 1 L. R. A. 476 (1888).

*West Virginia.*—Fisher v. West Virginia Co., 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69 (1896).

no dispute as to the extent to which the law should
It is not the mere intoxication that disables the person
m requiring service; it is the fact that he may be ob-
ious to the others. Therefore the mere fact that he
been drinking is not enough; he must be shown to be
intoxicated as to be irresponsible.[1] The same rules
ly to innkeepers, justifying them in rejecting intoxi-
ed persons and in ejecting guests who have become
nk.[2]

**33. Profane patrons.**

n accordance with these principles it is established
t persons using indecent or profane language may be
ised service at the outset, or cut off from further serv-
Both the proprietor and his other patrons have
right to insist that they shall not be thus insulted
offended. The most extreme case of this sort is a re-
t Texas case [3] where the language and conduct of the
senger ejected showed such a depth of degradation
o horrify the court. However the facts need not go to
s extent. A person may be refused service if there is
son to believe that if he is allowed to enter the carrier's
icle he will so conduct himself as to become obnoxious.
us it has been held [4] where a woman was suing a carrier

*New York.*—Milliman v. New
C. & H. R. R. R. Co., 66 N. Y.
(1876).
*exas.*—Paris & G. N. Ry. Co. v.
inson (Tex. Civ. App.), 114 S. W.
(1908).
See the *dicta* in:
*ew Hampshire.*—Markham v.
m, 8 N. H. 523, 31 Am. Dec.
(1837).
*orth Carolina.*—State v. Steele,
N. C. 766, 11 S. E. 478, 19 Am.
Rep. 573, 8 L. R. A. 516 (1890).
*nnsylvania.*—McHugh v.
Schlosser, 159 Pa. St. 480, 28 Atl.
302, 39 Am. St. Rep. 699 (1894).
*England.*—Rex v. Ivens, 7 Car. &
P. 213 (Eng., 1835).

[3] Atchison, T. & S. F. Ry. Co. v. Wood (Tex. Civ. App.), 77 S. W. 964 (1903). See also Peavy v. Georgia R. R. & Banking Co., 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334 (1888); Louisville & N. Ry. Co. v. Logan, 88 Ky. 232, 10 S. W. 655, 3 L. R. A. 80, 21 Am. Rep. 332 (1889).

[4] Stevenson v. West Seattle L. &

for refusal to receive her as a passenger, that evidence was admissible that prior to this the plaintiff while a passenger upon the boat had been guilty of obscene language [1] and indecent conduct in the presence of other passengers including ladies. Telegraph companies likewise need not accept obscene, blasphemous, profane or indecent messages,[2] although there is a case which holds that the telegraph company refuses an equivocal message at its peril.[3] But although telephone service may be cut off from a subscriber habitually profane,[4] it cannot later be cut off from a subscriber who has desisted from objectionable language upon complaint being made to him.[5]

### § 634. Ejection governed by same general principles as rejection.

To strengthen the citation throughout this chapter prominent cases of ejection for misconduct have been put in with the cases of rejection for the same reason. This is believed to be in every way justifiable notwithstanding some *dicta* to the contrary.[6] Even after one has been once duly accepted he may be ejected later for proper cause. By his admission he is perhaps in a better position to demand the services than when he first applied for service; but probably this advantage is merely tactical. While the burden is on one who applies for service to prove

I. Co., 22 Wash. 84, 60 Pac. 51 (1900). See also Louisville, N., A. & C. Ry. Co. v. Wolfe, 128 Ind. 347, 27 N. E. 606, 25 Am. Rep. 643 (1890).

[1] However a profane retort provoked by the act of the servant does not excuse rejection or ejection; see Rex v. Ivens, 7 Car. & P. 213 (1835), and El Paso Electric Ry. Co. v. Alderete, 36 Tex. Civ. App. 142, 81 S. W. 1246 (1904).

[2] Archambault v. Gt. North Western Telegraph Co., 14 Quebec, 8 (1886).

[3] Western Union Telegraph Co. v. Ferguson, 57 Ind. 495 (1877).

[4] Pugh v. City & Sub. Telephone Assn., 9 Cinn. Law Bull. 104 (1883).

[5] Huffman v. Marcy Mutual Telephone Co., 143 Ia. 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010 (1909).

[6] See Pearson v. Duane, 4 Wall. 605, 18 L. ed. 447 (1866); Coppin v. Braithwaite, 8 Jurist, 875 (1844).

imself entitled to demand it, as soon as he has been re-eived the burden is placed on the manager to justify the ct of ejecting him. But so far as substantive right goes, it ; doubtful if the applicant gains any by his acceptance. f after his admission circumstances occur which would ave justified refusal at the onset if they had existed when e applied, they will equally justify ejecting him.[1]

### *Topic C. Applicant Under Disability*

**635. Disabled persons in general.**

The aged and crippled cannot be refused service, although to some degree special care must be taken. The ight of passenger carriage is not confined to persons who re vigorous and sound, but is open to those ailing and nfirm.[2] If, however, the applicants be so far incapaciated as not to be able to look out for themselves with he ordinary assistance which the carrier is bound to exend, they may be refused transportation; but the carrier nust use proper discretion in deciding that question. It is not every sick or crippled or infirm person whom railroad regulation can exclude, but one so sick or so rippled or so infirm as not to be able to travel without id."[3] It should be added that even if they might be efused if presenting themselves unaccompanied they may nsist upon being taken when they do not ask special at-

[1] See among the many cases to his effect Louisville & N. R. R. Co. . Logan, 88 Ky. 232, 10 S. W. 655, L. R. A. 80 (1889), and Hudson v. ynn & B. R. R. Co., 178 Mass. 4, 59 N. E. 647 (1901).

[2] Wabash Ry. Co. v. Mathew, 99 U. S. 605, 50 L. ed. 329, 26 Sup. t. 752 (1905).

But an aged man who is partly aralyzed cannot expect to travel without an attendant. Louisville, N. & Gt. So. R. R. Co. v. Fleming, 14 Lea (Tenn.), 128 (1884).

[3] Quoted from Zachery v. Mobile & O. R. R. Co., 75 Miss. 746, 23 So. 434, 65 Am. Rep. 617, 41 L. R. A. 385 (1898).

See also similar language in Shendan v. Brooklyn & N. Ry. Co., 36 N. Y. 39, 93 Am. Dec. 490 (1873).

tention if accompanied by attendants of their own,[1] unless even with such attendants they will be an extraordinary care to the carrier.[2]

## § 636. Persons subject to an incapacity.

As has been seen incapable persons *non sui juris* cannot be refused as passengers simply because they are incapable of contracting. As to children,[3] for example, a distinction must be obviously made. Grown children although within age, may travel alone with practically as much assurance as adults; but infants of tender years could not of course travel without danger to themselves, or undue demands upon the carrier unless they were ac-

[1] Pullman P. Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89 (1878).

See also New Orleans, J. & G. N. Ry. Co. v. Statham, 42 Miss. 607, 97 Am. Dec. 478 (1869).

[2] Connors v. Cunard S. S. Co., 204 Mass. 310, 90 N. E. 601, 26 L. R. A. (N. S.) 171 (1910).

See also Furgason v. Citizens' Street Ry. Co., 16 Ind. App. 171, 44 N. E. 936 (1896).

Temporary assistance should be given those who are quite capable of traveling if given slight assistance. See:

*Georgia.*—Southern Ry. Co. v. Hobbs, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68 (1903).

*Minnesota.*—Croom v. Chicago, M. & St. P. Ry. Co., 52 Minn. 296, 53 N. W. 1128, 38 Am. St. Rep. 557, 18 L. R. A. 602 (1893).

*Tennessee.*—Railroad Co. v. Mitchell, 98 Tenn. 27, 40 S. W. 72 (1896).

*Texas.*—Central Texas & N. W. Ry. Co. v. Holloway (Tex. Civ. App.), 54 S. W. 419 (1899).

If the company through its agents undertakes to assist a party it must perform the service with due diligence. See:

*Georgia.*—Western & A. Ry. Co. v. Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655 (1896).

*New Hampshire.*—Foss v. Boston & Maine R. R. Co., 66 N. H. 256, 21 Atl. 222, 49 Am. St. Rep. 607, 11 L. R. A. 367 (1890).

*New York.*—Hanlon v. Central Ry. Co., 187 N. Y. 73, 79 N. E. 846 (1908).

*Texas.*—International & G. N. R. R. Co. v. Gilmer, 18 Tex. Civ. App. 680, 45 S. W. 1028 (1898).

[3] See:

*Minnesota.*—Braun v. Northern Pacific Ry. Co., 79 Minn. 404, 82 N. W. 675, 49 L. R. A, 319, 79 Am. St. Rep. 497 (1900).

*Tennessee.*—Warfield v. Louisville & N. R. R. Co., 104 Tenn. 74, 55 S. W. 304, 78 Am. St. Rep. 911 (1900).

ompanied by grown persons, such older persons being esponsible for them. In the former days the question f slaves [1] would have had place here; and it would have hen seemed plain that one could refuse a slave traveling lone without proper permit, because of the danger of eing implicated in an escape. But a master, or one hav- ng authority, could insist on having the slaves accepted vhen traveling in his company.

**637. Blind persons.**

Primarily the affliction of blindness unfits every person or safe travel by railway, if unaccompanied. No blind erson without previous experience could possibly ac- ommodate himself to the many exigencies incident to ravel by railroad, or guard himself against peril in board- ng and alighting from trains, changing from one train to nother, or threading his way in safety across the railway racks at crowded stations. Nor is such a regulation hardship upon the persons afflicted with blindness or ther disabling physical infirmity. It is rather a safe- guard thrown around them for their own protection. Therefore, as a carrier cannot be called upon to care for elpless persons, when a blind person applies to purchase ticket, being himself unknown to the agent, and that icket is refused, the carrier is not liable in damages.[2] But f the agent of the carrier knows of his personal knowledge f the competency to travel of the particular person, or f the fact of such ability is made known to him in any nanner, and he still persists wantonly and arbitrarily n his refusal to sell the person desiring passage a ticket,

[1] See:

*United States.*—Boyce v. Ander- on, 2 Pet. 150 (1829).

*Kentucky.*—Louisville & N. R. R. o. v. Young, 1 Bush. 401 (1866).

[2] Zachery v. Mobile & O. R. R. Co., 75 Miss. 746, 23 So. 435, 65 Am. St. Rep. 617, 41 L. R. A. 385 (1898).

the carrier may be made to respond in damages for his oppressive act.[1]

**§ 638. Sick persons.**

It has been seen that a public servant is under no obligation to accept a person infected with a contagious disease or in a disgusting condition.[2] To go to the other extreme, travelers who are simply ailing, but quite able to care for themselves, cannot be refused.[3] Nor can persons who by reason of their afflictions might perhaps be unpleasant to other passengers be excluded.[4] And to put intermediate cases, if a person ill or disabled, but not really dangerous or obnoxious to others, presents himself with proper attendance provided by himself, it seems right to require that he shall be given proper service.[5] But where the applicant is so ill as to require constant medical attendance, he may be refused although accompanied by a nurse.[6] If, however, a person who is apparently ill is actually accepted [7] or if a person is stricken after acceptance [8] then a special duty to take peculiar

[1] This whole paragraph is largely a paraphrase from the opinion of Justice Truly in Illinois Central R. R. Co. v. Smith, 85 Miss. 349, 37 So. 643, 70 L. R. A. 642 (1905), in which this last distinction is made.

Illinois Central Ry. Co. v. Allen, 28 Ky. Law. R. 108, 89 S. W. 150 (1905), *accord.*

[2] See § 631, *supra.* See also Pullman Co. v. Krauss, 145 Ala. 395, 40 So. 398 (1906), and other cases cited.

[3] Wabash Ry. Co. v. Mathew, 199 U. S. 605, 50 L. ed. 329, 26 S. Ct. 752 (1905). See § 635, *supra.*

[4] Regner v. Glens Falls, S. H. & F. E. St. Ry. Co., 26 N. Y. Supp. 625, 74 Hun, 202 (1893).

[5] *Indiana.*—Louisville & N. R. R. Co. v. Crunk, 119 Ind. 542, 21 N. E. 31, 12 Am. St. Rep. 443 (1889), *semble.*

*Minnesota.*—Croom v. Chicago, M. & St. P. Ry. Co., 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557 (1893).

[6] Connors v. Cunard S. S. Co., 204 Mass. 310, 90 N. E. 601 (1910).

[7] See particularly:

*Louisiana.*—Conolley v. Crescent City R. R. Co., 41 La. Ann. 57, 5 So. 259, 17 Am. St. Rep. 389, 3 L. R. A. 133 (1889).

[8] *United States.*—Meyer v. St. Louis, I. M. & S. Ry. Co., 54 Fed. 116, 4 C. C. A. 221 (1893), *semble.*

*New Hampshire.*—Foss v. Boston & Maine R. R. Co., 66 N. H. 256,

:are arises when the circumstances are known, but not ıntil they are known. Of course diseased persons may ɔroperly be segregated from the others; [1] and such persons nay at convenient times be given over to proper attend-ınce. All this is as good law for innkeepers as it is for :arriers.[2]

**§ 639. Insane persons.**

As to the case of insane persons similar distinctions ıre necessary. If they present themselves unattended :hey may be refused service as a general rule, because, :ven if not violent at the time, they are always a poten-:ial peril to other persons being served.[3] Perhaps one ɔught to distinguish between various kinds of mental ncapacity, thus a slightly feeble-minded person who went ıabitually without attendants could not, it seems, be 'efused. On the other hand even violently insane per-:ons must be taken when accompanied by sufficient guards. :n one case of this sort [4] where a lunatic with his keepers vas excluded from a passenger train, permission being given to travel by a freight train soon to follow, the gen-

:1 Atl. 222, 49 Am. St. Rep. 607, 11 .. R. A. 367 (1890) .

*New Jersey.*—Newark & S. O. ty. Co. v. McCann, 58 N. J. L. 42, 34 Atl. 1052, 33 L. R. A. 127 1896).

*New York.*—Sheridan v. Brook-yn Cy. & N. R. R. Co., 36 N. Y. 39, 3 Am. Dec. 490 (1867).

*Texas.*—St. Louis, A. & T. Ry. o. v. Finley, 79 Tex. 85, 15 S. W. 66 (1980).

[1] *United States.*—The Steamship Iammonia, 10 Ben. 512, Fed. Cas. o. 6006 (1879).

*District of Columbia.*—Lemont v. Washington & G. R. R. Co., 1 Mackey, 180 (1881).

*New York.*—Levy v. Corey 1, City Ct. Rep. Supp. 57 (1884).

[2] *Pennsylvania.* — McHugh v. Schlosser, 159 Pa. 480, 28 Atl. 302, 39 Am. St. Rep. 699 (1894).

[3] Meyer v. St. Louis, I. M. & S. Ry. Co., 54 Fed. 116, 10 U. S. App. 677, 4 C. C. A. 221 (1893). See also Pullman Co. v. Krauss, 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103 (1906), (disease), and Atchison, T. & S. F. Ry. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543 (1885), (delirium tremens).

[4] Owens v. Macon & B. R. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946 (1903).

eral problem of this topic was thus discussed by Mr. Justice Lamar: "In the case of unfortunates who are not responsible for their disorderly conduct, and who, at best, are involuntary passengers, a different question is presented, calling in each case for the exercise of a wise discretion. On the one hand, regard must be had for the safety and comfort of other travelers, and, on the other, to the fact that in losing his mind the lunatic has not lost the right to be transported. It may be vitally important that he be taken to a place where he can receive the attention and confinement rendered necessary by his mental state. The carrier cannot absolutely refuse transportation to insane persons, but it may in all cases insist that he be properly attended, safely guarded, and securely restrained. And even where such precautions have been taken, it is not bound to afford him, if violent, transportation in the cars in which other travelers are being conveyed."

**§ 640. Arrested persons.**

The public duty to transport officers having criminals in their charge is equally obvious. It is equally plain that such passengers need not be taken along with other passengers if it may reasonably be thought that they are of a sort which might prove to be dangerous or annoying to other passengers.[1] The right to eject the attendants of dangerous persons is involved in the right to reject such persons themselves. The nurse accompanying a person with contagious disease may be dealt with as the patient. The attendant of a dangerously insane person may be compelled to take his charge away. Officers having a dangerous criminal in charge may be compelled to

[1] See Brunswick & W. R. R. Co. v. Ponder, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152 (1903). See Owens v. Macon & B. R. R. Co., 119 Ga. 230, 46 S. E. 87, 63 L. R. A. 946 (1903).

ke him apart from other passengers. And the adult companying a too boisterous child may be ejected.[1]

*Topic D. Basis for Rejection*

**641. Rejection for present misconduct.**

The typical case for refusing service is when the applint is *in flagrante delicto*, when his present misconduct such as to justify the refusal to give the service asked ıder the existing circumstances. These disqualifications ıve been brought out in extreme form in the present ıapter. The rule is sometimes so stated as to cover only ıch extreme cases; but this must not be taken too literly.[2] "Suppose a known or suspected thief were to come ı board; would they not have a right to refuse him a ıssage? Might they not justly act upon the presumpon that his object was unlawful? Suppose a person were ı come on board, who was habitually drunk, and gross . his behavior, and obscene in his language, so as to be a ıblic annoyance; might not the proprietors refuse to low him a passage? I think they might, upon the just resumption of what his conduct would be." [3]

**642. Rejection for past misconduct.**

One would not be justified in pressing this doctrine to ıe point of saying as is sometimes incautiously said that ı applicant may be rejected by reason of his evil reputaon. Where the past misconduct has no relation to the

[1] Jackson v. St. Louis, I. M. & S. y. Co., 87 Mo. 422, 56 Am. Rep. 0 (1885).
See Jardine v. Cornell, 50 N. J. 485 (1888).

[2] Quoted from Mr. Justice Story's inion in Jencks v. Coleman, 2 mn. (U. S.) 221, 225 (1835).

[3] The leading case to this effect in modern times is Thurston v. Union Pacific R. R. Co., 4 Dillon (U. S.), 321, Fed. Cas. No. 14,019 (1877), where Judge Dillon held that a notorious gambler could be refused transportation as the railroad company might reasonably anticipate that he might cause harm to some of their passengers.

present service, there certainly can be no refusal. And indeed past misconduct as such cannot justify a refusal. Thus a railroad cannot refuse to carry a man who once disobeyed its ticket regulations.[1] So a man who once previously had presented himself drunk cannot be refused at another time when plainly sober.[2] And a patron who once profane in his speech had long since desisted upon warning, cannot be refused further service.[3] But if the past misconduct has been so long continued that it makes only too probable a repetition of it, notwithstanding protests of reformation there may perhaps be a refusal to give the service which will present the opportunity.[4]

**§ 643. Rejection upon probable cause.**

If the danger or inconvenience to the carrier or his patrons seems reasonably imminent although not absolutely certain there would seem to be sufficient ground to justify the carrier in refusing to perform the service asked. This is well elaborated in a late Massachusetts case,[5] where a steamship company refused to take the risk of accepting a woman whose condition was serious, Mr. Justice Loring thus summarizing the authorities: "It was held in all these cases that the justification was made out if the carrier had reasonable cause to suppose and did suppose that the safety or convenience of other passengers would be endangered by the person in question, and that it was not necessary to wait to see if the person believed and with reason to be afflicted with an infectious disease,

[1] Atwater v. Del., Lack. & W. R. R. Co., 48 N. J. L. 55, 2 Atl. 803 (1886).

[2] Story v. Norfolk & S. Ry. Co., 133 N. C. 59, 45 S. E. 349 (1903).

[3] Huffman v. Marcy Mutual Telephone Co., 143 Iowa, 590, 121 N. W. 1033, 23 L. R. A. (N. S.) 1010 (1909).

[4] Stevenson v. West Seattle Land & Imp. Co., 22 Wash. 84, 60 Pac. 51 (1900).

[5] Connors v. Cunard S. S. Co., 204 Mass. 310, 90 N. E. 601, 26 L. R. A. (N. S.) 171 (1910).

r so insane, drunk, or sick as to be likely to interfere with he safety or convenience of other passengers, was or was ot in fact in the condition he appeared to be in." [1]

**644. Ejection before actual misconduct.**

As the same principles should apply whether it be a ase of ejection after acceptance or rejection at the outset, he leading case of Vinton v. Middlesex Street Railway ompany [2] may be cited here. In this case the defendant ailway introduced evidence tending to show that at the ime of the expulsion the plaintiff, intoxicated and using oud and profane language, was attempting to strike at he conductor. At the trial the judge ruled that the con- uctor had no right to eject unless the actual conduct f the plaintiff at the time was offensive or annoying to he passengers. The Massachusetts court—Mr. Chief ustice Bigelow writing the opinion—held this view too mited: "Certainly the conductor in charge of the vehicle as not bound to wait until some overt act of violence, rofaneness or other misconduct had been committed, o the inconvenience or annoyance of other passengers, efore exercising his authority to exclude or expel the ffender. The right and power of the defendants and heir servants to prevent the occurrence of improper and isorderly conduct in a public vehicle is quite as essential nd important as the authority to stop a disturbance or epress acts of violence or breaches of decorum after they ave been committed, and the mischief of annoyance nd disturbance have been done. Indeed, if the rule laid own at the trial be correct, then it would follow that assengers in public vehicles must be subjected to a cer- ain amount or degree of discomfort or insult from evil-

[1] See also, holding similarly, ullman Car Co. v. Krauss, 145 la. 395, 40 So. 398, 4 L. R. A. N. S.) 103 (1906).

[2] 11 Allen (Mass.), 304, 87 Am. Dec. 714 (1865).

disposed persons before the right to expel them would accrue to a carrier or his servant. There would be no authority to restrain or prevent profaneness, indecency, or other breaches of decorum in speech or behavior, until it had continued long enough to become manifest to the eye or ears of other passengers. It is obvious that any such restriction on the operation of the rule of law would greatly diminish its value." [1]

**§ 645. Whether refusal should be at peril.**

It would seem to follow from all this, if the public servant is to be allowed due power to protect himself in his service and the public which he is serving, that the question in such cases should be whether the applicant had given him reasonable grounds to believe that the defense existed. Thus a traveler may be ejected who from outward signs, such as eruptive fever, appears to have a contagious disease,[2] although in fact he has not. This case (as will have transpired throughout the paragraphs just preceding) represents the great weight of authority. But there are a few cases to the contrary holding in effect that as no proper applicant can ever be refused the company acts at its peril. And a street railway was recently held for rejecting a passenger who was apparently in *delirium tremens*, but who really was afflicted with St. Vitus Dance.[3]

**§ 646. Rejection for misconduct of companion.**

The right is sometimes claimed to reject one person by reason of the misconduct of another accompanying him.

[1] See also the later Massachusetts case of Hudson v. Lynn & Boston R. R. Co., 178 Mass. 64, 59 N. E. 647 (1901).

[2] Paddock v. Atchison, T. & S. F. Ry. Co., 37 Fed. 841 (1889). See also Pullman P. C. Co. v. Bales, 80 Tex. 211, 14 S. W. 855, 15 S. W. 785 (1890).

[3] Regner v. Glens Falls, etc., R. R. Co., 26 N. Y. Supp. 625, 74 Hun, 202 (1893). See also Seaboard A. L. Ry. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427 (1905).

nis may be true where the misconduct is that of an at-ndant in charge of a child or a patient; [1] but this is not ue of a mere companion.[2] Thus in a leading case [3] an nkeeper refused to serve an applicant because he be-nged to the militia and wore the uniform, other members which wearing the same uniform having previously isconducted themselves. The innkeeper alleged that was unable to discriminate between them, and took em all as parties who came there to create a disturbance the house. This excuse was held insufficient.[4] However ıere [5] certain persons attempted to procure passage in a ɔck car, some of whom had transportation and others .d not, those holding transportation attempting to con-al the others, it was held that they all became trespassers .d subjected themselves to ejection.[6]

See Warfield v. Railroad Co., Tenn. 74, 55 S. W. 304, 78 Am. Rep. 911 (1900).

Thus a passenger may be ejected ng with his dog. Gregory v. icago & N. Ry. Co., 100 Ia. 345, N. W. 532 (1896).

*Mississippi.*—Louisville & N. R. Co. v. Maybin, 66 Miss. 83, o. 401 (1888).

*West Virginia.*—Gillingham v. io River R. R. Co., 35 W. Va. ), 14 S. E. 243, 14 L. R. A. 798, Am. St. Rep. 827 (1891).

Atwater v. Sawyer, 76 Me. 539, Am. Rep. 634 (1884).

However, where premises have been closed by the police for harboring a bucket shop, the telegraph company may require assurances from the successor to the proprietor of the business. Matter of Cullen, 106 N. Y. App. Div. 250, 94 N. Y. Supp. 290 (1905).

[5] Texas & P. Ry. Co. v. Diefenbach, 167 Fed. 39 (1909).

[6] The conductor is not required to permit the person to continue on the train upon the promise of another passenger to see that he will hurt nobody. Louisville & N. R. R. Co. v. Setser's Admr. (Ky.), 128 S. W. 341 (1910).

# CHAPTER XIX

## JUSTIFICATION FOR SUSPENDING SERVICE

§ 650. General situations justifying suspension.

*Topic A. Natural Conditions*

§ 651. Failure of water supply.
652. Exhaustion of irrigation supply.
653. Division of natural gas.
654. Service dependent on water power.

*Topic B. Inevitable Accidents*

§ 655. Convulsions of nature.
656. Storms and floods.
657. Electrical disturbance.
658. Normal conditions.
659. Unavoidable accidents.

*Topic C. Insufficient Facilities*

§ 660. When accommodations offered are exhausted.
661. Limitations upon the carrier's obligation.
662. Extended obligation of the railroads.
663. Facilities unexpectedly become outgrown.
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665. Division of facilities among applicants.

*Topic D. Human Obstacles*

§ 666. Enemy forces.
667. Domestic violence.
668. Refusal to receive because of strike.
669. Refusal to receive because of violent strike.
670. Situation when sympathetic strike.
671. How employés of the carriers are affected.

### § 650. General situations justifying suspension.

There are many situations in which it is justifiable to suspend service in whole or in part. These are discussed in much detail later in dealing with the obligation to carry

through properly a particular service after it has been undertaken. But it is obvious that the same considerations will justify a refusal to accept new applications for service during the period,if the company would be excused for not completing in regular course business already on hand. Without going into the matter further at present as to the various circumstances which may make suspension permissible it is enough to point out here that when the management has done the best that could be expected of it under the conditions at the time, it has done all that the law requires. "But in the absence of the existence of an exceptional cause, such as the act of God, the public enemy, unavoidable accident or an abnormal and unanticipated inrush of business which will prevent the performance of its common-law duty to shippers, a common carrier has no right to refuse to receive and transport property offered for shipment." [1] It will be seen that these are general considerations applying to service in general; and therein this general justification, impersonal in its application, differs from the particular excuses, personal in character, which have just been under discussion recently.[2]

### *Topic A. Natural Conditions*

**§ 651. Failure of water supply.**

In dealing with water companies it must always be taken into account that natural limitations to a considerable extent limit the supply. For example an unusual drought long continuing would excuse a partial suspension of service.[3] But failure to be ready to meet the de-

[1] The quotation is from Knight v. Quincy, O. & K. C. R. R. Co., 120 Mo. App. 311 (1906).

[2] See also the various instances of justification enumerated in Houston & T. C. R. R. Co. v. Mayes, 201 U. S. 329, 50 L. ed. 72, 26 Sup. Ct. 491 (1906).

[3] State Trust Co. of N. Y. v. City of Duluth, 70 Minn. 257, 73

mands of its public during dry periods which are to be expected is a plain breach of its duty. So serious was this believed to be in the case of one water company, at least, as to warrant forfeiture of its charter.[1] In this case the water company attempted to excuse its four failures to supply proper water in the preceding four years by alleging that there was a protracted drought at each time; but the evidence tended to show that this long drought was usual in the heated season of each year. The case is therefore sufficiently differentiated from the first cases, where the drought was of unprecedented duration.

**§ 652. Exhaustion of irrigation supply.**

In irrigation we have a typical case of natural limitation. When the flow of a stream is diverted by irrigation works, the profession of the managing company may fairly be said to be confined to the water that may properly be appropriated. It is consequently under no duty to provide other sources of supply even against recurrent drought, as its obligation is limited to the proper diversion of the appropriated water.[2] Only while it has available water is it bound to supply applicants. Thus an answer to a complaint for mandamus that the irrigation company has not sufficient water to supply the plaintiff and all others owning lands lying under the flow of the ditch, was held plainly insufficient without an averment that the available supply had been exhausted by prior demands.[3] But such prior takings exhausting the depend-

N. W. 249 (1897). See also State ex rel. Olmstead v. Proprietors of the Morris Aqueduct, 46 N. J. L. 495 (1884).

But see Gainesville Water Co. v. City of Gainesville (Tex.), 128 S. W. 370 (1910).

[1] Capital City Water Co. v. State, 105 Ala. 406, 432, 18 So. 62, 29 L. R. A. 743 (1894).

[2] See Lowe v. Yolo County Consolidated Water Co., 6 Cal. App. Div. 646, 96 Pac. 379 (1908).

[3] Merrill v. Southside Irrigation Co., 121 Cal. 426, 44 Pac. 720 (1896).

able supply do constitute a justification for the refusal of further applications.[1] Indeed, there are several cases which go to the extent of granting an injunction brought by present users upon the showing that the supply is taken up to a proper capacity, ordering the company to cease from taking on new customers.[2]

**§ 653. Division of natural gas.**

Natural gas presents another plain instance of natural limitation. After a piping system has once been constructed from certain fields for the supply of a certain community, it is true in an abstract sense that all have equal rights to the service offered. When the available supply has been taken up by the present customers and new applications still come in, it may be that reasonable efforts ought to be made to get more out of these fields by sinking more wells; but certainly it will not be compelled to establish a plant for the manufacture of gas since that would be outside its profession. When this natural limitation is certain, the cases hold that the available supply must be shared by the present takers with the new applicants. In a late case [3] on that point, the Indiana Supreme Court insisted that: "In the rendering of such a service there should be no advantage accorded to prior applicants. It cannot be doubted that there is equality of right on the part of each of the inhabitants living along appellant's mains." The rule for natural gas it will be noticed is opposed to the rule for the

[1] *United States.*—See San Diego Flume Co. v. Souther, 112 Fed. 228 (1901).

*Idaho.*—Bardsly v. Boise Irr. & Land Co., 8 Idaho, 155, 67 Pac. 428 (1901); Shelby v. Farmers' Coöperative Ditch Co., 10 Idaho, 732, 80 Pac. 222 (1905).

[2] *California.*—McDermont v. Anaheim Union Water Co., 124 Cal. 112, 56 Pac. 779 (1899).

*Colorado.*—Brown v. Farmers' H. L. Canal & Reservoir Co., 26 Colo. 66, 56 Pac. 183 (1899).

[3] Indiana Natural Gas & O. Co. v. State ex rel., 162 Ind. 690, 71 N. E. 133 (1904).

disposition of the irrigation cases discussed in the last paragraph. Logical though it may be, it seems to the writer to be lacking in appreciation of the situation as a whole. A rule which may result in satisfactory service to none, not even to the applicant in question, is hardly consistent with public service for all. Certainly where the supply now available is not sufficient to meet the proper demands of present customers, it would seem that later applicants could not demand the reduction of the takings of older customers.[1]

**§ 654. Service dependent on water power.**

Where a service is undertaken generally, as the supply of electricity to a city for illumination, although the chief reliance of the company is upon a water power, nevertheless where it undertakes the delivery of constant current, it should provide itself with auxiliary power.[2] But where a company undertakes impliedly no more than the transmutation of water power into electric energy in the sense that it only undertakes the delivery of such amount of electricity as its water power may produce, it will not be liable for failure to supply energy consequent upon the variations in the flow of the river.[3]

*Topic B. Inevitable Accidents*

**§ 655. Convulsions of nature.**

One of the characteristic defenses in the law of public callings generally is the happening of an accident without the intervention of human action.[4] Of this so-called act

[1] State ex rel. v. Consumers' Gas Trust Co., 157 Ind. 345, 61 N. E. 674, 55 L. R. A. 245 (1901); Indiana Natural & Ill. Gas Co. v. State ex rel., 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761 (1901), *accord.*

[2] Compare Boal v. Citizens' Nat. Gas Co., 23 Pa. Super. Ct. 339 (1903).

[3] See Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 70 L. R. A. 472, 109 Am. St. Rep. 526 (1905).

[4] See, for examples of this, Slater v. South Carolina Ry. Co., 29 S. C.

f God, convulsions of nature such as earthquakes and ındslides are perhaps the most striking examples. This efense of act of God comes up principally as a defense fter service has been undertaken; and it is there discussed hiefly in this treatise.[1] But it is equally a defense for efusing to undertake further service upon usual terms uring the time that the disturbance affects the situation. . carrier is not only excused for loss of goods in his hands y a convulsion of nature, but if his communications are ıterrupted he is excused from not rendering proper serv-e to new applicants at that time.

**656. Storms and floods.**

Similarly extraordinary weather conditions excuse not nly defaults in the service, but justify suspension of ervice as well. Storms of unusual violence, unexpected oods from unusual rains, are prominent examples of atural forces which may excuse default in a service al-eady undertaken, unless the carrier is negligent in the ıatter.[2] *A fortiori* such phenomena would justify a re-

), 6 S. E. 936 (1888), and Gleeson Virginia Midland R. R. Co., 140 . S. 435, 35 L. ed. 458, 11 Sup. Ct. 59 (1889). See §§ 978 *et seq.*, *infra*.

[1] See, for instances of this, The harles Nelson, 149 Fed. 846 (1906) ıd Blythe *v.* Denver & R. G. Ry. o., 15 Colo. 333, 25 Pac. 702, 11 . R. A. 615, 22 Am. St. Rep. 403 891).

[2] Leading cases for this general ıctrine are:

*United States.*—Empire State C. o. v. Atchison, T. & S. F. Ry. Co., 0 U. S. 1, 52 L. ed. 931, 28 Sup. t. Rep. 607 (1907).

*Alabama.*—Smith & Co. v. West-n Ry. of Ala., 91 Ala. 455, 8 So. 4, 24 Am. St. Rep. 929 (1890).

*Illinois.*—Wald v. Pittsburg, C., C. & St. L. R. R. Co., 162 Ill. 545, 44 N. E. 888, 53 Am. St. Rep. 332, 35 L. R. A. 356 (1896).

*Iowa.*—Green Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co., 130 Iowa, 123, 106 N. W. 498 (1906).

*Minnesota.*—Bibb Broom Corn Co. v. Atchison, T. & S. F. Ry. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A. 509 (1905).

*Nebraska.*—Wabash Ry. Co. v. Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823 (1906).

*Pennsylvania.*—Long v. Pennsylvania R. R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732 (1892).

See further §§ 980–981 *et seq.*

fusal to undertake further service so long as the disturbance seriously affects the situation. In a recent case [1] of this sort a connecting carrier expressly refused to receive certain cars loaded with freight placed upon its connecting track because the Missouri River was overflowing the freight yards and further rise was obviously imminent. Said the appellate court: "In this instance defendant's tracks were threatened with inundation from an impending and unprecedented flood of water, which finally culminated in great disaster to railroads and shipments and interruption of all kinds of transportation for several days. Under such conditions, defendant had the right to refuse plaintiff's property in order to avoid liability for its loss or damage which was then threatened. The flood was of such a character as to fall properly within the legal definition of an act of God, and such was a sufficient excuse for the defendant in refusing plaintiff's shipment."

**§ 657. Electrical disturbance.**

Electrical disturbances which with our present knowledge are all but unforeseen, and against which sufficient protection in the present state of the art is very difficult, will often excuse a telephone company or a telegraph company for suspending service.[2] The whole situation is elaborately worked out in one case thus: [3] "Under these

[1] Gray v. Wabash R. R. Co., 119 Mo. App. 144, 149, 95 S. W. 983 (1906). See also Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 135 Fed. 135 (1905); s. c. 210 U. S. 1, 51 L. ed. 331, 27 Sup. Ct. 780 (1908).

But even where the obstruction of line is by act of God, a carrier who with knowledge of this accepts goods without notifying the shipper is liable. Nelson v. Gt. Northern R. R. Co., 28 Mont. 297, 72 Pac. 642 (1903).

[2] Western Union Telegraph Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181 (1902); White W. & K. v. Western Union Telegraph Co., 14 Fed, 710 (1882) *accord.*

[3] Western Union Telegraph Co. v. Bierhans, 12 Ind. App. 17, 39 N. E. 881, 882 (1895); Fleischner v. Pacific Postal Telegraph Cable Co. (C. C.), 55 Fed. 738 (1893), *accord.*

ssues we think, when the appellees proved the delivery of the message for transmission, and the failure to transnit and deliver the same to sendee within the time required, the appellees had made a *prima facie* case against appellant. If the latter could avoid liability under the ssues it must be because of something averred by way of defense in the answer. Had the appellant proved that t was prevented from transmitting the message on account of the storm, this would not be a complete defense, according to the former holding in this case. The appellant would also be required to show that the appellees had notice of the fact that the appellant was thus prevented, and left the message for transmission with knowledge of he disturbing atmospheric conditions. All this is by way of defense, and is part and parcel of the same."

**658. Normal conditions.**

The usual variations in temperature, the usual range of velocity in winds, the expected variations in precipitation, the regular progression of seasonal changes—whatever interruption of service is due to these is not excused. For the person professing the service should take proper precautions to avoid interference with the regular course of business by such conditions. This is true of all services of which there is general profession. Dew upon he tracks does not excuse a railroad; [1] winds do not excuse a boatman,[2] cold weather does not excuse a gas company; [3] and darkness does not excuse a ferryman [4]—to out four examples. In this last case of the ferryman who

[1] Missouri, K. & T. Ry. Co. v. Ruskett, 2 Ind. T. 633, 53 S. W. 44 (1899); s. c. 44 C. C. A. 179, 04 Fed. 728; s. c. 186 U. S. 480, 6 L. ed. 1259, 22 Sup. Ct. 943 1902).

[2] Koretke v. Irwin & Co., 100 Ala. 323, 13 So. 943 (1893).

[3] Indiana Natural & Ill. Gas. Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868 (1900).

[4] Quoted from Pate v. Henry, 5 Stew. & P. (Ala.) 101 (1833).

refused to put out when conditions did not suit him, these distinctions were quaintly put: "The defendant dwells upon the great hardship of requiring persons in this situation to expose themselves to the dangers attendant upon the transportation of persons, etc., during excessive darkness, the prevalence of high winds, or in the dead hour of the night. To require this would be hard. But it certainly would be equally so to permit a ferryman to stop a person traveling upon urgent business just at nightfall, when there might be a moon shining rendering it almost as light as it would be of a cloudy day, merely because he chose to do so."

**§ 659. Unavoidable accidents.**

Loss caused by inevitable accident subjects no one in public employment to liability; even the carrier of goods is not liable in such a case.[1] By a parity of reasoning such accidents, if they make service temporarily impracticable, might well justify a suspension of service. This was said with discrimination in a Kentucky case [2] where a railroad had failed to furnish freight cars promptly upon request. "It seems to us as a railroad company is not nor should be generally held to more than reasonable diligence and care in furnishing cars for transportation of freight, the wreck of a train whereby free movement of cars is temporarily prevented, ought to be treated as legal excuse for delay in having them under special agreement at a particular time and place."

[1] Goldey v. Pennsylvania R. R. Co., 30 Pa. St. 242, 72 Am. Dec. 703 (1858). But if the carrier might by any possibility have avoided the catastrophe he is liable. Central of Ga. R. R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679 (1905).

[2] Newport News, etc., Co. v. Mercer & W., 96 Ky. 475, 29 S. W. 301 (1985).

See also Knight v. Quincy, O. & K. C. R. R. Co., 120 Mo. App. 311 (1906).

*Topic C. Insufficient Facilities*

**660. When accommodations offered are exhausted.**

It has also been seen that in certain services the profession to serve the public is limited to the premises devoted to the public service. In such instances it is a sufficient excuse that the accommodations offered are exhausted. When the innkeeper's accommodation is exhausted, he may refuse to receive an applicant as a guest. If all his sleeping rooms are occupied, he need not admit any more guests.[1] The same is unquestionably true of others who go no further in their profession of public employment than to devote their premises to public use. Thus warehousemen, and wharfingers, to cite two examples, are certainly bound to serve the public to the extent of their capacity; but it seems to be equally clear that they have an excuse for refusing further service after their capacity is exhausted.[2]

**661. Limitations upon the carrier's obligation.**

According to the early cases also the carrier was only bound to accept goods if he had room in his pack.[3] And this remains true of carriers of the earlier type, such as carters, that they need not accept anything beyond the capacity of their vehicle.[4] So no demands may be made upon carriers of special freight beyond their peculiar equipment.[5] And as it has recently been held steamship owners have no obligation to take freight after their vessel is

[1] Browne v. Brandt, 1 K. B. 696, 71 L. J. K. B. 367, 86 L. T. 625, 50 W. R. 654 (1902). See also State v. Steele, 106 N. C. 766, 11 S. E. 478, 19 Am. St. Rep. 573, 8 L. R. A. 516 (1890).

[2] See § 269, *supra*.

[3] Jackson v. Rogers, 2 Show, 327 (1683). See also In re Oxlade v. N. E. Ry. Co., 15 C. B. (N. S.) 680 (1864).

[4] Tunnel v. Pettijohn, 2 Harr. (Del.) 48 (1835). See also Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393 (1847).

[5] Gillingham v. Ohio River Ry. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798 (1891).

loaded to its capacity.[1] The explanation of these cases seems to be that the profession made is originally limited to the devotion simply of the original equipment to the public. This was certainly the original common law before modern conditions were anticipated.

**§ 662. Extended obligation of the railroads.**

The great carriers of modern times profess a general service independent of particular vehicles. The modern railroad is bound to use due diligence to provide sufficient cars to carry on its business, and in the ordinary case it cannot excuse itself for failure to carry passengers or goods merely by showing that it did not have vehicles enough to transport them.[2] This might result in allowing the carrier to urge its own failure in its duty to provide adequate facilities as an excuse. It is however true that if cars are needed in which to load car loads of goods, notice of that fact must be given to the carrier in advance.[3] It cannot be expected to provide empty cars of every sort at each station enough to meet an unexpected demand; but if it is given reasonable notice of the need of such a car he must supply the car.[4] Default in these obligations subjects the carriers to an inexorable liability.[5]

[1] Ocean S. S. Co. v. Savannah L. W. & S. Co. (Ga.), 63 S. E. 577, 20 L. R. A. (N. S.) 867 (1909).

[2] *Kansas.*—See Kansas Pac. Ry. Co. v. Nichols & Co., 9 Kan. 235, 72 Am. Rep. 494 (1872).

*Missouri.*—Tucker v. Pacific R. R. Co., 50 Mo. 385 (1872).

*North Carolina.*—Hansley v. Jamesville & W. R. R. Co., 117 N. C. 565, 23 S. E. 443, 53 Am. St. Rep. 600 (1895).

*Texas.*—Missouri Pacific Ry. Co. v. Harris, 67 Tex. 166, (1886).

And see generally § 268.

[3] *Maryland.*—Di Giorgio Imp. & S. S. Co. v. Pennsylvania R. R. Co., 104 Md. 693, 65 Atl. 425 (1906).

*Illinois.*—Chicago & A. R. R. Co. v. Erickson, 91 Ill. 613 (1879).

And see generally § 801.

[4] *Maryland.*—Baltimore & O. R. R. Co. v. Whitehall, 104 Md. 295. 64 Atl. 1033 (1906).

*Wisconsin.*—Ayres v. Chicago & Northwestern R. R. Co., 71 Wis. 372, 37 N. W. 432 (1888).

And see generally § 799.

[5] Yazoo & Mississippi Valley R. R. Co. v. Blum Co., 88 Miss. 180, 40 So. Rep. 748 (1906).

See also Louisville, N. O. & T.

**663. Facilities unexpectedly become outgrown.**

This duty it will be seen is relative, not absolute. Where acilities are suddenly outgrown there is an excuse for ıot having sufficient facilities in readiness to meet new lemands. The railroad is bound to provide only for such , demand for carriage as it may reasonably foresee; it :annot be required to be able at any time to care for an :xtraordinary and unexpected demand for carriage.[1] The ınexpected demand rendering it impossible after its ve-ıicles are all in use to carry more goods or passengers, vill excuse it for refusing to receive additional goods or )assengers.[2] Thus a rule of a street car company that ıo passengers would be taken after the car had become )vercrowded is plainly reasonable.[3] And where a train ıas become dangerously overcrowded the conductor is ustified in ordering that the train shall be run without

ły. Co. v. Patterson, 69 Miss. 421, .3 So. 697 (1891).

And see generally § 800.

[1] See generally §§ 798–802.

[2] See particularly:

*United States.*—St. Louis, I. M. & ). Ry. Co. v. Hampton, 162 Fed. 693 (1908).

*Arkansas.*—St. Louis, I. M. & S. ły. Co. v. Wynne H. & C. Co., 81 Ark. 373, 99 S. W. 375 (1907).

*Georgia.*—Southern Ry. Co. v. Atlanta Land & S. Co. (Ga.), 68 ). E. 807 (1910).

*Indiana.*—Chicago, St. L. & P. R. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320 (1894).

*Kansas.*—Udall Milling Co. v. Atchison, T. & S. F. R. R. Co., 82 Kan. 256, 108 Pac. 137 (1910).

*Kentucky.*—Louisville & N. R. R. Co. v. Queen City Coal Co., 99 Ky. 217, 35 S. W. 626 (1896).

*Missouri.*—Dawson v. Chicago & A. R. R. Co., 79 Mo. 296 (1883).

*Nebraska.*—State v. Chicago, B. & Q. R. R. Co., 71 Neb. 593, 99 N. W. 309 (1904).

*New York.*—Wibert v. New York & E. R. R. Co., 12 N. Y. 245 (1855).

*North Carolina.*—Branch v. Wilmington & W. R. R. Co., 77 N. C. 347 (1877).

*South Carolina.*—Porcher v. Northeastern R. R. Co., 14 Rich. Law, 181 (1867).

*Texas.*—Wallace v. Pecos & N. T. Ry. Co. (Tex. Civ. App.), 110 S. W. 162 (1908).

*Wisconsin.*—Ayres v. Chicago & N. W. Ry. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 (1888).

[3] Hanna v. Nassau Electric R. R. Co., 18 N. Y. App. Div. 137, 45 N. Y. Supp. 437 (1897).

stopping according to schedule at a station where more passengers are awaiting it.[1]

**§ 664. Normal fluctuations of business.**

It follows from what has just been said that if the sudden press of business might have been provided against by reasonable diligence there is no such excuse. For example, a railroad company should provide more cars upon its passenger trains if it should have been anticipated that more passengers than usual would offer themselves for transportation.[2] And to apply the same rule to the transportation of freight, the carrier performs his public duty only if he provides for the normal fluctuation in the offering of freight.[3] The sufficiency of such accommodations must be determined by the number of passengers and the amount of freight ordinarily transported on the given line of road. The duty of a company to the public in this respect is not peculiar to any season of the year, or to any particular emergency that may arise in the course of its business. The amount of business ordinarily done by the road is the proper measure of its obligation to furnish transportation. This requirement it must be prepared to meet, and if by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause there should be an unexpected influx of busi-

[1] Gordon v. Manchester & L. R. R. Co., 52 N. H. 596, 13 Am. Rep. 97 (1873).

[2] *New Hampshire.*—Gordon v. Manchester & L. R. R. Co., 52 N. H. 596, 13 Am. Rep. 97 (1873).

*North Carolina.*—Purcell v. Richmond & D. R. R. Co., 108 N. C. 414, 12 S. E. 954, 12 L. R. A. 113, and note (1891).

[3] *United States.*—Trumbull v. Erickson, 97 Fed. 891, 38 C. C. A. 536 (1899); Atlantic C. L. Ry. Co. v. Geraty, 166 Fed. 10, 91 C. C. A. 602 (1908).

*Arkansas.*—St. Louis, I. M. & S. Ry. Co. v. Wynne Hoop & C. Co., 81 Ark. 373, 99 S. W. 375 (1907).

*Illinois.*—Illinois Central Ry. Co. v. Cobb, C. & Co., 64 Ill. 128 (1872).

*Indiana.*—Chicago, St. L. & P. R. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451 (1894).

*Mississippi.*—Yazoo & M. V. R. R. Co. v. Blum Co., 88 Miss. 180,

ess to the road, this obligation will be fully met by ship-
ing such stock or produce in the order of time in which
, is offered.

**665. Division of facilities among applicants.**

As will be seen when the subject of facilities is reached,
; is not a complete disposition of the problem to say that
'hen the facilities available prove insufficient to meet
nexpected demands, the failure to handle all the busi-
ess offered is excused. The problem still remains—and
; is a difficult one—as to the basis upon which the avail-
ble facilities shall be divided among the persons apply-
ıg. When such an emergency happens, the carrier must
ccept and carry things of a higher class before accepting
nd carrying those of a lower class. In general, it may
e said that preference must be given to passengers. Live
tock must be preferred to dead freight. And among the
lasses of dead freight, perishable goods must be accepted
nd carried before nonperishable goods.[1] In regard to the

) So. 748, 10 L. R. A. (N. S.) 432
906).

*Missouri.*—Ballentine v. North
lo. R. R. Co., 40 Mo. 491, 93 Am.
ec. 315 (1867), paraphrased above.

*Nebraska.*—State v. Chicago, B.
Q. R. R. Co., 71 Neb. 593, 99 N.
'. 309 (1904).

*New York.*—Tierney v. New York
. & H. R. R. Co., 76 N. Y. 305
879).

*North Carolina.*—Hansley v.
ımesville & W. R. R. Co., 117
. C. 565, 23 S. E. 443, 53 Am. St.
ep. 600 (1895).

*South Carolina.* — Porcher v.
ortheastern R. R. Co., 14 Rich.
ıw, 181 (1867).

*Wisconsin.*—Ayres v. Chicago &
orthwestern R. R. Co., 71 Wis.
'2, 37 N. W. 432 (1888).

See generally §§ 798–802.

Upon similar principles a telephone company must expand its facilities to meet the increasing demands upon its service. State ex rel. v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870 (1901).

But the telephone company has a reasonable time granted it to provide additional facilities when the growth in its business has been larger than it ought fairly to be required to provide against. Cumberland Telephone & T. Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268 (1908).

[1] This matter is fully discussed later: see §§ 837, 842, *passim*, citing among other cases:

*Georgia.*—Southern Ry. Co. v.

distribution of facilities for shipments of the same class there has been much discussion of late. The earlier view was that applicants should be served in rotation in order of their application. But it seems to be agreed in recent years that there should be a proration to stations first in proportion to their usual business and at stations to shippers in proportion to their average business.[1]

### *Topic D. Human Obstacles*

### § 666. Enemy forces.

Another immemorial excuse for failure in performance

Atlanta Sand & S. Co. (Ga.), 68 S. E. 80 (1910).

*Illinois.*—Michigan C. R. R. Co. v. Curtis, 80 Ill. 324 (1875).

*Iowa.*—Dixon v. Chicago, R. I. & P. Ry. Co., 64 Ia. 531, 21 N. W. 17, 52 Am. Rep. 460 (1884).

*Kentucky.*—Louisville & N. Ry. Co. v. Queen City Coal Co., 13 Ky. Law Rep. 832 (1892).

*New York.*—Tierney v. New York C. & H. R. R. R. Co., 76 N. Y. 305 (1879).

*West Virginia.*—McGraw v. Baltimore & O. R. R. Co., 18 W. Va. 361, 41 Am. Rep. 696 (1881).

*England.*—Briddon v. Great Northern Ry. Co., 28 L. J. Ex. 51 (1858).

[1] This matter is fully discussed later, see §§ 850–857, *passim*, citing among other cases:

*United States.*—United States v. Norfolk & W. Ry. Co., 109 Fed. 831 (1901); Harp v. Choctaw, O. & G. Ry. Co., 118 Fed. 169 (1902); United States v. West Virginia Northern Ry. Co., 125 Fed. 252 (1903); United States v. Norfolk & W. Ry. Co., 138 Fed. 849 (1905); United States v. Norfolk & W. Ry. Co., 143 Fed. 266, 74 C. C. A. 404 (1906); Baltimore & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481, 30 S. Ct. Rep. 164 (1910).

*Arkansas.*—Choctaw, Oklahoma & Gulf R. R. Co. v. State, 73 Ark. 373, 84 S. W. 502, 92 S. W. 26 (1904).

*Indiana.*—Chicago, St. L. & P. R. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320 (1894).

*Massachusetts.*—Swetland v. B. & A. R. R. Co., 102 Mass. 276 (1869).

*Minnesota.*—Martin v. Gt. Northern Ry. Co., 110 Minn. 118, 124 N. W. 825 (1910).

*Missouri.*—Ballentine v. North Missouri R. R. Co., 40 Mo. 491, 93 Am. Dec. 315 (1867).

*Nebraska.*—State v. Chicago, B. & Q. R. R. Co., 71 Neb. 593, 99 N. W. 309 (1904).

*New York.*—Strough v. N. Y. C. & H. R. R. R. Co., 92 App. Div. 584, 87 N. Y. Supp. 30 (1904).

*Wisconsin.*—Ayres v. Chicago & Northwestern Ry. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 (1888).

by one in public employment is the interference of the King's enemies. In so far as public service is interrupted by enemy forces or service rendered dangerous by enemy forces there is plain justification [1] for suspension of service. Not only does the interference of the public enemy excuse default in service already begun but it justifies a refusal to engage in a service in which the risk is imminent. One may refuse to undertake a service which will lead him into the enemy's lines or subject him to the dangers of capture.[2] Because he would be excused if the worst should happen is no reason why he should be called upon to take the risk.

**§ 667. Domestic violence.**

It would seem that abstractly the problem is the same whether it is a case of collision with a foreign power or the suppression of domestic violence. However when it is a question of excusing a carrier from whom the goods have been taken or in whose hands the goods have been destroyed from his liability as an insurer, the excuse is limited to acts of a public enemy, mere domestic violence furnishing no excuse.[3] According to the traditional law

[1] *Georgia.*—Wallace v. Landers, 42 Ga. 486 (1871), s. c., 50 Ga. 134 (1872).

*Kentucky.*—Bland v. Adams Express Co., 1 Duval, 232, 85 Am. Dec. 623 (1864).

*New Mexico.*—Seligman v. Armijo, 1 N. Mex. 459 (1870).

*North Carolina.*—Patterson v. No. Carolina R. R. Co., 64 N. C. 147 (1870).

*Rhode Island.*—Hubbard & Co. v. Harnden Express Co., 10 R. I. 244 (1872).

*Tennessee.*—Southern Express Co. v. Womack, 1 Heisk. 256 (1870).

[2] Illinois Central R. R. Co. v. Hornberger, 77 Ill. 457 (1875); Phelps v. Illinois Central R. R. Co., 94 Ill. 548 (1880).

See generally § 980, *infra*.

But if the railroad continues to accept freight with knowledge of its situation and without notifying the shipper it may not urge this excuse for delay. Illinois Central R. R. Co. v. Ashmead, 58 Ill. 487 (1871); Illinois Central R. R. Co. v. Cobb, Christy & Co., 64 Ill. 128 (1872).

[3] *United States.*—Sherman v. Pennsylvania R. R. Co., Fed. Cas. No. 12,769, 8 Wkly. Notes Cas. (Pa.) 269 (1880).

if a carrier be robbed by a hundred men he is never the more excused.[1] But where it is a question of a refusal to accept goods or of a delay in performing their transportation, it is as good an excuse that rioters have interrupted service or made it dangerous as that enemies have done it.[2] But it seems according to certain authorities at least that the carrier must judge at his peril as to the reality of the necessity of suspending service.[3]

**§ 668. Refusal to receive because of strike.**

Since the carrier undertakes to carry, and to provide vehicles and servants for that purpose, he is bound to do so; and he is therefore remiss in the performance of his undertaking if for any reason he fails to provide sufficient equipment. The fact that he is prevented from doing so by a strike of his employés is, therefore, no defense to him. The most important case upon the question is probably People v. New York Central & H. R. Railroad Co.,[4] where a mandamus was granted against a railroad

*Arkansas.*—Missouri Pacific Ry. Co. v. Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80 (1895).

*Pennsylvania.*—Lang v. Pennsylvania R. R. Co., 154 Pa. 342, 26 Atl. 370, 20 L. R. A. 360, 35 Am. St. Rep. 846 (1893).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323 (1889).

See generally § 981, *infra.*

[1] See Mors v. Slue, 1 Mod. 85 (1671), and Edwards v. Sherratt, 1 East. 604 (1801).

[2] *Kentucky.*—Louisville & N. R. R. Co. v. Bell, 13 Ky. L. Rep. 393 (1891).

*Illinois.*—Indianapolis & St. Louis R. R. Co. v. Juntgen, 10 Ill. App. 295 (1881). See also Pittsburg, C., C. & St. L. Ry. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022 (1909).

*Minnesota.*—See Fewings v. Mendenhall, 83 Minn. 237, 86 N. W. 96, 55 L. R. A. 713. See also s. c., 88 Minn. 336, 93 N. W. 127, 97 Am. St. Rep. 519, 60 L. R. A. 601 (1903).

*New York.*—Geismer v. Lake Shore & M. S. Ry. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837 (1886).

*Pennsylvania.*—Hall v. Pennsylvania R. R. Co., 14 Phila. 414 (1880).

[3] Railroad Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579 (1892).

[4] 28 Hun (N. Y.), 543 (1883).

See also Blackstock v. New York

which had partially suspended its business temporarily because of a strike for higher wages. In the course of an elaborate opinion upon public service in general Mr. Justice Davis said: "These facts reduce the question to this: can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employés over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally-expressed consent of the State. The trusts are active, potential, and imperative and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law." [1]

**669. Refusal to receive because of violent strike.**

When, however, the carrier has provided sufficient vehicles and servants to carry, and is prevented from proceeding by the violence of a mob over which he has no control, he is excused from his duties with respect to

E. R. R. Co., 20 N. Y. 48, 75 Am. Dec. 372 (1859), to the same effect.

[1] The general rule in all public services seems to be that a mere strike of its own employés furnishes no excuse for discontinuance of service "for even one hour."

*Georgia.*—Central R. R. & Banking Co. v. Georgia Fruit & V. Exchange, 91 Ga. 389, 17 S. E. 904 (1893).

*Illinois.*—Pittsburg, Ft. Wayne & C. R. R. Co. v. Hazen, 84 Ill. 36, 5 Am. Rep. 422 (1876).

*Indiana.*—Bartlett v. Pittsburg, C. & St. L. Ry. Co., 94 Ind. 281 (1883).

*New York.*—Loader v. Brooklyn Heights R. R. Co., 35 N. Y. Supp. 996, 14 N. Y. Misc. 208 (1895).

*Texas.*—International & G. N. Ry. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545 (1889). Missouri Pac. Ry. Co. v. Levi (Tex.), 14 S. W. 1062 (1889).

But see Murphey Hardware Co. v. Southern Ry. Co., 150 N. C. 703, 64 S. E. 873, 22 L. R. A. (N. S.) 1200 (1909), holding that a machinists' strike which has got beyond the railroad's control may be an excuse for not serving promptly.

Mere proof that there is a strike upon the defendant's road is no excuse for failing to furnish cars as it may be a "slight affair"; but one

transportation.[1] Thus in Lake Shore and Michigan Southern Railway Company v. Bennett,[2] the suit was brought by the shipper against the carrier for damages to live stock, caused by delay in transportation beyond the regular time. It was shown that a violent strike was in progress throughout the system, and that mobs held up the traffic, delaying the movement of freights. The violence could not be held in check by the public authorities. The court, therefore, held the carrier excused. On petition for rehearing, Hammon, J., said: "The appellee's loss resulted from causes over which the appellant had no control, and against which no care or prudence could have provided; and the special findings show that the appellee's property had all the care and attention that, under the circumstances, an ordinarily careful man would have bestowed upon his own property."

**§ 670. Situation when sympathetic strike.**

Even when a railroad is faced by a sympathetic strike,

of such magnitude as to tie up the whole system would be. Southern Ry. Co. v. Atlanta Sand & S. Co. (Ga.), 68 S. E. 807 (1910).

[1] *Kentucky.*—Louisville & N. R. R. Co. v. Bell, 13 Ky. L. Rep. 393 (1891).

*Illinois.*—Indianapolis & St. Louis R. R. Co. v. Juntgen, 10 Ill. App. 295 (1881).

*Indiana.*—Pittsburgh, C. & St. L. R. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63 (1879).

*Minnesota.*—See Fewings v. Mendenhall, 83 Minn. 237, 86 N. W. 96, 55 L. R. A. 713 (1901). See also s. c., 88 Minn. 336, 93 N. W. 127, 97 Am. St. Rep. 519, 60 L. R. A. 601 (1903).

*Montana.*—State ex rel. v. Great Northern Ry. Co., 14 Mont. 381, 36 Pac. 458 (1894).

*New York.*—Geismer v. Lake Shore & M. S. Ry. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837 (1886).

*Pennsylvania.*—Hall v. Pennsylvania R. R. Co., 14 Phila. 414 (1880).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45 (1890).

[2] 89 Ind. 457 (1883).

See also:

*Mississippi.*—Kansas City, M. & B. R. R. Co. v. Spencer, 72 Miss. 491, 17 So. 168 (1894).

*New York.*—Steiger v. Erie Ry. Co., 5 Hun, 345 (1875).

t should call upon its employés to move the cars ten-
ed by a railroad against which a boycott has been de-
red, it cannot refuse to accept such freight.[1] As Mr.
stice Graham said in granting a mandatory injunction
such a case:[2] "No temporary inconveniences to the de-
ıdant company or the public which it serves are in
judgment, for one moment to be compared with the
al consequences which must ensue from a precedent
which it would be established that a railway company
y in violation of the law of the land refuse to receive
l have the cars of a connecting line at the command
any irresponsible persons, or from its own belief and
prehension that its employés will leave its service and
p the operation of its lines. Such an excuse as this is
olly inadmissible and must be set aside."

**71. How employés of the carriers are affected.**

In the present state of the law, it may be seen that
ose that conduct a public service are at a great disad-
ıntage in dealing with their employés. If the law be
that the employers are under a duty to serve every
tant even if the employés quit work without notice,
ve injustice may result. But if the law would go fur-
r and enforce some duty upon the employés in the
mises, this impartial attitude would preserve the equi-
rium. And, indeed, it is no more difficult to declare
ıt employés must complete their term of service in
easonable way than it is to compel the employers to
ıtinue to provide adequate service. Nor is it more
sh to apply the coercive processes of the courts to en-

Central Railroad & Banking Co.
eorgia F. & V. Exchange, 91 Ga.
17 S. E. 904 (1893). See also
rphey Hardware Co. v. South-
Ry. Co., 150 N. C. 703, 64 S. E.
22 L. R. A. (N. S.) 1200 (1909).

[2] Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co., 34 Fed. 481 (1888). The same doctrine is expressed in Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Ry. Co., 54 Fed. 746 (1893).

force those obligations in one case than in the other.[1] This view of the matter is suggested by Toledo, Ann Arbor and North Michigan Railway v. Pennsylvania Railway.[2]

[1] See Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (1894).

[2] 54 Fed. 746 (1893).

# CHAPTER XX

## PROMOTION OF ITS BUSINESS INTERESTS

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### § 680. Business policies inconsistent with public employment.

New conditions seem to us often to create new laws, however much we may be told that nothing more is happening than an orderly evolution by the application of existing rules to present circumstances. In the case of the public service companies, the increase in their power has led to such development in the law as to work an apparant revolution for which many people were not prepared. We have been so used to the many liberties permitted those who carry on a private business that it has not been seen how fundamentally different are the limitations upon public calling. Those who conduct a private business may adopt such policies as will produce the greatest profits; but those who profess a public employment must not do anything inconsistent with their public duty. Accordingly, many policies for getting patrons away from others or protecting an established custom from competition which are legal enough in private business must be held illegal in public business.

*Topic A. Unfair Competition*

### § 681. Exclusive custom cannot be demanded.

From a business standpoint it may be an effective policy at times to refuse to have any dealings with a customer who persists in patronizing a rival also. But in the case of public services such a policy would seem to be in the face of the public duty to serve all that apply. For example, a railroad must take the freight of all who tender it properly, regardless of whether the shipper at times employs another carrier to get his goods to market. In one lead-

ing case, Chicago and Alton Railroad Company v. Suffern,[1] it appeared that defendants having connection with a switch to plaintiff's mine, disconnected it and refused to supply cars and receive coal from plaintiff, because he allowed another road to connect with the switch. The Illinois court held that mandamus would issue to compel the connection, saying in effect that a railroad cannot refuse to receive coal over its road because shippers send over another road also. Such a company it was said must carry all freight offered, if legal charges are paid. Since fair competition between roads is for public interest, if a road could do so it would establish the most odious sort of monopoly.[2]

**§ 682. Partial service already rendered by rival.**

It will sometimes be found that a carrier is refusing to complete a service for an applicant who has already received a part of the service desired from a rival. Where the applicant is demanding no more than any other member of the public might demand, refusal of the request cannot be justified upon any such ground as that the enforcement of this policy may result in the getting the whole of the business for the carrier. In one of the leading cases in the law of passenger carriers, Bennett v. Dut-

[1] 129 Ill. 274, 21 N. E. 824 (1889).

[2] Now that the law against discrimination has been developed it is seen that there can be no legal justification for a carrier who makes lower rates to particular shippers in order to get them away from a rival carrier. See especially Wright v. United States, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. 822 (1897); Menacho v. Ward, 27 Fed. 529 (1886); Brundred v. Rice, 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589 (1892); Fitzgerald v. Grand Trunk R. R. Co., 63 Vt. 169, 22 Atl. 76, 13 L. R. A. 70 (1890).

But before there was any principle against discrimination a difference in rates might be made for this as well as for any other rational reason. See especially Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712 (1894); Ragan & B. v. Aiken, 9 Lea, 609, 42 Am. Rep. 684 (1882).

ton,[1] it appeared that a through line of coaches which ran from A to C through B, was refusing to take into its coaches at B for transportation to C, passengers who had come up from A to B on the same day by a rival line which ran only from A to B. The court held this to be a plain violation of public duty; but it conceded that seats might be held in the second coach for through passengers. On the other hand, in order to further its business interests in this respect a carrier may refuse to do anything for applicants who have received partial service from a rival which it is not plainly its public duty to do. Thus a transportation line may accept goods without requiring prepayment from one connection with which it is associated and demand prepayment from a rival connection; and more plainly still, it may as a favor to an affiliated connection advance to it the charges already incurred while refusing to do this for the rival.[2]

[1] 10 N. H. 481 (1839).

So a carrier of freight cannot make a higher charge against goods which do not come to the connecting point by the line with which it is associated. Samuels v. Louisville & N. Ry. Co., 31 Fed. 57 (1887). See also Missouri, K. & T. Ry. Co. v. New Era Milling Co. (Kan.), 100 Pac. 273 (1909).

As the law of discrimination is now developed it is held that a lower rate cannot be made for taking goods from B to C which came from A whence a competitive line to C ran. Bigbee & W. R. P. Co. v. Mobile & O. R. R. Co., 60 Fed. 545 (1893). See also Alabama, etc., Ry. Co. v. Railroad Commission, 86 Miss. 667 (1908).

[2] Baltimore & O. R. R. Co. v. Adams Exp. Co., 22 Fed. 32 (1884); Little Rock & M. Ry. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed. 400 (1894); Oregon S. L. & U. N. Ry. Co. v. Northern Pacific R. R. Co., 61 Fed. 158, 9 C. C. A. 409 (1984); Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co., 63 Fed. 775, 11 C. C. A. 417 (1894); Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co., 86 Fed. 407, 30 C. C. A. 142 (1898); Southern Indiana Exp. Co. v. United States Exp. Co., 92 Fed. 1022, 35 C. C. A. 172 (1899).

It is otherwise provided by statute in some States now; and statutes are held to be so in furtherance of the highest development of the law calling for the utmost impartiality in public service as to be constitutional. American Exp. Co. v. Southern Indiana Exp. Co., 167 Ind. 292, 78 N. E. 1021 (1906).

**§ 683. Telephone companies cannot forbid rival installation.**

The general principle now under examination that a public service company must serve all who apply whether they are dealing with a rival or not, is well illustrated in the recent case of State ex rel. Gwynn v. Citizens' Telephone Company [1] the facts of which sufficiently appear in this significant passage from the opinion of Chief Justice McIver. "It seems to us that the respondent, after offering to the public its telephone system for the transmission of news, would have no more right to refuse to furnish the relator its facilities for the transmission of news unless he would agree not to use the Bell telephone system in operation in the same city, but use exclusively respondent's system, than a railway company would have to refuse to transport the goods of a shipper unless such shipper would agree to patronize its line exclusively, and not give any of its business to any competing railway line." [2]

**§ 684. Exclusive regulations by the Associated Press.**

In one of the leading cases [3] in public service law in recent times action was brought by a newspaper company against the Associated Press for threatening to cut off the news service which the newspaper company was receiving under a contract providing that the newspaper company would not deal with any other association whose news service the Associated Press should decide to be antagonistic. The plaintiff having taken news from a rival news bureau upon the list of those declared antag-

[1] 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870 (1901).

[2] See also Gwynn v. Citizens' Telephone Co., 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111 (1904), holding the contract which the subscriber was forced to enter into void as contrary to public policy.

[3] Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184 (1900).

onistic was refused further service by the Associated Press. The court decided that the complaint of the newspaper owners should not have been dismissed. Justice Phillips having decided that the business was public in character, not private as had been contended, proceeded to apply the peculiar law of public service to the situation in hand, "The character of appellee's business is not to be determined by the contract which it made respecting the liabilities which would attend it but by the nature of the business, its fixed legal character growing out of the manner in which that business is conducted, and the purpose of its creation. The legal character of the corporation and its duties cannot be disregarded because of any stipulation incorporated in a contract that it should not be liable to discharge a public duty. Its obligation to serve the public is not one resting on contract, but grows out of the fact that it is in the discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto." [1]

**§ 685. Status of exclusive contracts.**

Exclusive contracts cannot be imposed upon applicants against their will, nor always enforced against them if they have entered into them. This is certainly true when the exclusive feature might deprive the contracting party of necessary service which the original company cannot adequately furnish him. Thus in a Minnesota case [2] it was held that a covenant by a quarryman that his freight shall go exclusively by one railroad does not run with the land to a purchaser of the quarry, even against one who has notice thereof. In the South Carolina case [3] al-

[1] State v. Associated Press, 159 Mo. 410, 60 S. W. 91, 81 Am. St. Rep. 368 (1900), is *contra* on the ground that the business was not public in character.

[2] Kettle River R. R. Co. v. Eastern Ry. Co. of Minn., 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111 (1889).

[3] Gwynn v. Citizens' Telephone

ready discussed in this chapter service was refused a customer who had subscribed to a rival telephone in breach of his exclusive contract with the original company. But the court finally held the contract against public policy, and the customer not liable therefore for its breach. It is therefore idle for a public service company to attempt to ward off approaching competition by making it advantageous for its patrons to enter into exclusive contracts for terms of years. But in Indiana lately [1] a contract by a consumer of electricity to take all the current he might use from the company with which he was contracting for a reduced rate given him was assumed to be valid. And in a Pennsylvania case a contract under which a mine was developed with the aid of the railroad with a provision in the contract that all its freight should go out by that railroad, was held not to be against public policy.[2] Perhaps these last cases can be reconciled with those which were first stated by saying that in these cases the customer is offered all the service that he can possibly need by the original company with which he has contracted, while in the cases discussed previously in this paragraph the original company did not furnish a substitute for the other service desired.

Co., 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111 (1904).

[1] Beck v. Indianapolis L. & P. Co., 36 Ind. App. 600, 76 N. E. 312 (1905).

[2] Bald Eagle Valley Ry. Co. v. Nittany Valley Ry. Co., 171 Pa. 284, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. Rep. 807 (1895).

Certainly in the modern view as to the extent of public duty it is held to be no legal justification for making a lower rate to a particular customer that he has agreed to give all his business to the company granting the reduction. See particularly Menacho v. Ward, 27 Fed. 529 (1886); Louisville, E. & St. L. C. R. R. Co. v. Wilson, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105 (1892).

But formerly when there was no principle against discrimination as such, reductions could be made to get exclusive contracts. See Lough v. Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712 (1894); Fitchburg R. R. Co. v. Gage, 12 Gray (Mass.), 393 (1859).

**§ 686. Refusal to take another's customers.**

Sometimes a contract will be found between two or more public service companies operating within the same district, that one will not take on applicants who are being served by another. As this is in defiance of their public duty to the community they serve, it would seem to be altogether bad. Indeed the Supreme Court of Indiana felt in one case that such an agreement between gas companies [1] was so outrageous as to constitute ground for forfeiture of its charter. "By the agreement in question, when carried into effect, the patrons of one company were excluded from being supplied with gas from the other company. Each company was, by the terms of the agreement, bound to abide by and maintain the prices fixed, and each was prohibited from furnishing gas to the customers of the other. That the people of that city who desired to become consumers of gas were, by the agreement in question, deprived of the benefits that might result to them from competition between the two companies certainly cannot be successfully denied. The exclusion of competition, under the agreement, redounded solely to the benefit of appellee and the other company, and the enforcement of the compact between them could be nothing less than detrimental to the public. By uniting in this agreement appellee disabled, or at least professed to have disabled, itself from the performance of its implied duties to furnish gas impartially to all, and thereby made public accommodations subservient to its own private interests."[2]

[1] State ex rel. v. Portland Natural Gas and Oil Co., 153 Ind. 483, 489, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314 (1899).

[2] Citing among other cases:

*United States.*—Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979 (1888).

*Illinois.*—People ex rel. v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319 (1889).

*Indiana.*—Portland Natural Gas

*Topic B. Contracts Opposed to Public Service*

**687. Contract not to deal with other applicants.**

It is plain at all events that no engagement which one ommitted to public service may have made can be urged ›y him as an excuse for not being ready to perform the ısual obligations of his employment which are imposed ıpon him by positive law. A striking instance of this ;eneral problem is where the applicant is refused service ›n the ground that the company had previously entered nto a contract with a former applicant not to serve him. n a late case;[1] Sammons v. Kearney Power & Irrigation Company, a contract made by a reservoir company with ›ne taker of water for power to run its electrical machinery ›roviding that it would not furnish any other applicant vith water to be used to generate electricity was held in-'alid. In the elaborate opinion covering the whole mat-er as to the public services in general,[2] Commissioner ılbert said: "In the case at bar we are dealing with ›n irrigation company—a quasi-public corporation. It is ılso a governmental agency, but its main purpose is the ›dministration of a public utility. To the extent of its apacity it is bound to furnish water from its canal to ›ersons desiring to use it on equal terms and without ıiscrimination. In this respect it stands on the same ooting as a railroad company. Neither has the right

: O. Co. v. State, 135 Ind. 54, 34 I. E. 818, 21 L. R. A. 639 (1893).

[1] 77 Neb. 580, 110 N. W. 308, 312 1906).

[2] Citing particularly State v. Iartford & N. H. R. R. Co., 29 'onn. 538 (1861); Chicago Gaslight 'o. v. People's Gaslight Co., 121 ll. 530, 13 N. E. 169, 2 Am. St. Rep. 24 (1887); and West Virginia 'ransp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527 (1883).

See to the same effect Cumberland Telephone & Telegraph Co. v. Morgan's L. & T. R. R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442 (1889), contract not to give a rival telegraph company the transportation service which had been given the contracting company held void.

or the power to place itself in a position where it cannot serve every person on equal terms with every other person. Neither has the right or power to bind itself by a contract which, if enforced, would render it unable to serve the public on those terms or to carry out its main purpose."

**§ 688. Special contract for priority.**

Upon the same principles a contract between a public service company and one of its customers to give him service in priority to others is against public policy. Thus a clause in a contract between a telegraph company and a railroad company in which the railroad business was given precedence was held no excuse for a default to a private customer. "It cannot subtract itself from obedience to the rates prescribed by the authority of the State acting through the Commission by a contract giving one customer the railroad preference in business and pleading that such business occupies the only wire it has." [1] In another case of the same sort it has been held that a natural gas company cannot make contracts with an earlier consumer to supply him with all the gas he may need and urge this contract as an excuse for failing to give a sufficient supply to later customers.[2]

**§ 689. Contract to exclude others from simultaneous service.**

Where service is being rendered upon a private basis a special arrangement may be made; but where the service is upon a public basis a contract not to give to others

[1] Leavell v. Western Union Telegraph Co., 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798 (1895).

See also Western Union Telegraph Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25 (1891), *accord*.

[2] Fairchance Window Glass Co. v. Star Gas Co. (Pa. Co. Ct.), 66 Legal Intelligencer, 544 (1909).

But the surplus above all public service requirements may be sold to one taker exclusively. Conemaugh Gas Co. v. Jackson Farm Gas Co., 186 Pa. St. 443, 40 Atl. 1000, 65 Am. St. Rep. 865 (1898).

he same service at the same time is void. The Tennessee ourt pointed this out plainly in a recent case where one ıewspaper company got the railroad company to agree ıot to take other newspapers upon the early train.[1] The ·pinion of Chief Justice Beard in holding that this exlusive arrangement was inconsistent with public duty ; a very striking argument. He said: "It would hardly ıe contended that a railroad by making a special and xclusive contract to transport shoes manufactured by one ıarty in a community, could strip itself of its commonaw character, and decline, without any reason save he existence of said contract, to transport boxes of shoes or another manufacturer in the same community. If his be so, where is the controlling difference between uch a case and the one now before us?" [2]

**690. Exclusive contracts with an intermediate service.** Arrangements may sometimes be found between a ırincipal service company for selling a supply to an interıediate company for resale to consumers accompanied ıy an agreement not to engage in direct service within he sphere of the intermediate service in competition with t. How far such arrangements may be made depends ·pon whether they conflict with public duty. If the teritory covered by the intermediate service is included ·ithin the district which the company is bound to serve uch an arrangement could not, it seems, excuse an apılication for direct service.[3] But if the seller has not as

[1] Memphis News Publishing Co., . Southern Ry. Co., 110 Tenn. 684 5 S. W. 941, 63 L. R. A. 150 (1903).

[2] See also Youghiogheny & O. 'oal Co. v. Erie Ry Co., 24 Ohio 'ir. Ct. 289 (1902), where it was eld that the owners of a coal conveyor could not give exclusive right ) utilize it to one concern.

[3] Note the arrangements made in:

*Nebraska.*—American Water Works Co. v. State, 46 Neb. 194, 64 N. W. 711, 50 Am. St. Rep. 610 (1895).

*Oregon.*—Hangen v. Abina Light & W. Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

yet committed itself to the service of that territory it may it seems, refuse to go into the district with direct service.[1] As for contracts between a principal service and a subordinate service whereby the principal service delegates to one concern the exclusive privilege of performing the service required of it, there are, as has been seen in a previous chapter, two opinions. Thus the cases are divided as regards the right of a railroad to agree with an express company that it shall have the exclusive right to do that business over the route free from any competition, even that of the railroad itself. There are cases which hold that such an exclusive contract is not opposed to public duty.[2] But there are perhaps as many courts which feel that such arrangements are contrary to public duty.[3]

**§ 691. Effect of restrictive covenants in conveyances.** It is a safe principle to go by that no arrangement will be enforced by the courts whereby public service is hampered, even if such arrangements are generally supported where private business is involved. A striking example of this was a case where a clause in a conveyance between a farmer and a pipe line company providing that no similar service should be permitted within the tract covered was held void.[4] In the latest case [5] in the grant of a right of way through his land to one gas company the grantor covenanted that no other should pass through his lands.

[1] Note the arrangements made in: *Georgia.*—Milledgeville Water Co. v. Edwards, 121 Ga. 555, 49 S. E. 621 (1904).

*Missouri.*—Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019 (1903).

[2] See the Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. 542, 628 (1886), and cases cited in the discussion in § 515, *supra.*

[3] See McDuffee v. Portland & Rochester R. R. Co., 52 N. H. 430, 13 Am. Rep. 72 (1873), and cases cited in the discussion in § 516, *supra.*

[4] West Virginia Transportation Co. v. Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527 (1883).

[5] Calor O. & G. Co. v. Franzell, 128 Ky. 715, 109 S. W. 328 (1908).

This was held invalid, the Kentucky court saying: "What would be thought, for instance, of the proposition that a railroad corporation could lease from the owners a belt of land surrounding a municipality, and provide in the lease that it should have the exclusive right to operate a railroad across the land in question?" Certainly therefore such restrictions will not excuse a refusal to act according to the ordinary obligations of public service. Thus it was held in an English case [1] where a railroad refused to accept coal or coke from a particular station not mined or made on the estate, since the land for the station was conveyed to them only on that condition, that such a private arrangement was held contrary to the public interest; and the railroad was accordingly ordered to carry the coal of every shipper from that station. Similarly in a recent Kentucky case,[2] a covenant giving to the grantor of the right of way for a public siding the exclusive right to ship coal from it, was held no excuse for refusal to accept coal from another shipper. As the court pointed out, the railroad must see to it that it was able to handle all shipments; and it could always acquire the right of way by eminent domain free of entangling conditions.

**§ 692. Contract limitations upon licensees.**

A more extreme application of these principles was made in a series of telephone cases, all involving practically the same facts. It appeared that the operating companies were usually licensees of a parent company which had

[1] Rishton Local Board v. Lancashire & Y. Ry. Co., 8 R. & C. T. C. 74 (1893).

[2] Louisville & N. R. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 98 Am. St. Rep. 447, 55 L. R. A. 601 (1901).

See further:

*United States.*—Western Union Telegraph Co. v. Baltimore & O. Tel. Co., 19 Fed. Rep. 660 (1884).

*Illinois.*—St. Louis & C. R. R. Co. v. Postal Tel. Co., 173 Ill. 508, 51 N. E. 382 (1898).

entered into a contract with a telegraph company practically giving it exclusive privileges in the use of the telephone in handling messages. Notwithstanding these arrangements the courts held that as the telephone companies must serve all patrons alike, they could not refuse to install a telephone in the office of another telegraph company alleging as an excuse the disabilities which they, as licensees, were under by the terms of their arrangements with their licensers. There is no better statement of the full principles of the uncompromising law of public service than in these telephone cases. In the earliest of them [1] Thayer, J., said: "In my judgment, this clause of the contract is indefensible when called in question by any person or corporation injuriously affected thereby. In so far as the contract between the respondent and the patentee compels the former to discriminate against one class of its would-be customers, and to deny them the same privileges and service which it accords to others, the contract is invalid. It is not possible to admit the principle that a railroad, telegraph, or telephone company may avoid the performance of any part of the paramount duty they owe to the entire public by contract obligations which they may enter into, even with the patentee of an invention." [2]

[1] 22 Alb. L. J. 363 (1880).

[2] *United States.*—State of Missouri v. Bell Telephone Co., 23 Fed. Rep. 539 (1885); Delaware & A. Telegraph & Telephone Co. v. State of Delaware, 50 Fed. 677, 2 C. C. A. 1 (1892). See 5 L. R. A. 161, note.

*Maryland.*—Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167 (1886).

*Nebraska.*—State ex rel. v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404 (1885).

*Ohio.*—State ex rel., etc., v. Bell Telephone Co., 36 Ohio St. 296 (1880).

*Pennsylvania.*—Bell Telephone Co. v. Commonwealth ex rel. (Pa.), 3 Atl. 825 (1886).

*Vermont.*—Commercial U. Tel. Co. v. New England T. & T. Co., 61 Vt. 241, 17 Atl. 1071, 5 L. R. A. 161, 15 Am. St. Rep. 893 (1889).

But see American Rapid Tele-

**§ 693. Contract for division of territory.**

Upon similar principles a contract between public service companies for partition of common territory between themselves is generally held unenforcible as peculiarly against public policy even though the companies were under no mandatory duty to supply the territory divided.[1] In the leading case [2] on this point the Illinois court refused to enforce such a contract between gas companies, not listening to the cases involving private businesses where such contracts are often held valid. "The ordinary rule that contracts in partial restraint of trade are not invalid," said the court, "does not apply to corporations like the appellant and appellee because they were engaged in a public business and in furnishing that which was a matter of public concern to all the inhabitants of the

graph Co. v. Connecticut Telephone Co., 49 Conn. 352, 44 Am. Rep. 237 (1881).

The establishment of this law involved ignoring the supposed right of a patentee to exploit the public. As Mr. Justice Brewer said in State of Missouri v. Bell Telephone Co., 23 Fed. 539 (1885), the patentee who devotes his devise to public use can claim no greater sanctity for it than can the owner of any other property.

Similar reasoning was followed in a striking case where a city ordinance ordered a railroad company to light its platforms with the equipment furnished by the local electric light company. The company urged that the ordinance was void because it subjected them to the unlimited extortion of the patentees, but the court held that the electric company must deal with them upon a reasonable basis as the whole business was affected with a public interest. Cincinnati, H. & D. R. R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422 (1897).

[1] See on this point:

*Delaware.*—Wilmington City Ry. Co. v. Wilmington, etc., Ry. Co., 8 Del. Ch. 468 (1900).

*Kansas.*—Keene Syndicate v. Wichita Gas, E. L. & P. Co., 69 Kans. 284, 76 Pac. 834, 67 L. R. A. 61 (1904).

*Illinois.*—South Chicago City Ry. Co. v. Calumet Ry. Co., 171 Ill. 391, 49 N. E. 576 (1898).

*Indiana.*—Chicago, I. & L. Ry. Co. v. Southern Ind. Ry. Co., 38 Ind. App. 234, 70 N. E. 843 (1904).

[2] Chicago G. L. & C. Co. v. People's G. L. & C. Co., 121 Ill. 530, 13 N. E. 169 (1887).

See also the language in South Chicago City Ry. Co. v. Calumet Ry. Co., 171 Ill. 391, 49 N. E. 576 (1898).

City." However if such a contract for withdrawal from particular territory has been executed, a person resident in one district cannot demand service from the outside company.[1] By the execution of such a contract the companies in question have signified their withdrawal from the territories in question. If they have thus confined their profession to their respective territories there is no way to compel them to serve a larger district thenceforth. This arrangement however could not be effectively perfected if there were mandatory clauses in their charters. Moreover there are authorities to the effect that reasonable arrangements for partition of territory between public service companies will be enforced for reasons of policy to be set forth presently.[2] For there are some courts which are hospitably inclined toward pooling agreements.

**§ 694. Pooling arrangements usually void.**

In accordance with the doctrines shown in this chapter, any arrangements between public service companies for pooling their business in any way must inevitably be held invalid as in restraint of trade. Perhaps the most lucid statement of the actual law is that of Mr. Justice Calwell, in one of the more recent Federal cases[3] where all relief was refused one party to an elaborate pooling contract against another for refusal to account according to its terms upon these general principles thus succinctly stated. "A railroad company is a quasi-public corporation, and owes certain duties to the public, among which are the duties

[1] Weld v. Gas & Electric Light Commissioners, 197 Mass. 556, 84 N. E. 101 (1908).

See also Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363, 1 L. R. A. 456 (1888).

[2] Ives v. Smith et al., 8 N. Y. Supp. 46 (1889). See the compromise view taken in Home Telephone Co. v. North Manchester Telephone Co. (Ind. App.), 92 N. E. 558 (1910) that such contracts are only invalid in so far as they interfere with a desirable public service.

[3] Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co., 61 Fed. 993, 9 C. C. A. 659 (1894).

;o afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties or which makes it to its nterest not to perform them, or removes all incentive ;o their performance, is contrary to public policy and void." [1] However there are a few cases which hold that pooling in public services instead of being peculiarly illegal, should really be regarded as truly in accordance with public interests, and therefore not against public policy. To this view many eminent economists and several law writers incline. Indeed this seems to be the English law,[2] which is followed in some few American jurisdictions.[3] In the leading English case just cited, Vice

[1] Citing:

*United States.*—Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979 (1889).

*Georgia.*—Western Union Telegraph Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781 1880).

*Indiana.*—Cleveland, C., C. & I. Ry. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. Rep. 593 (1890).

*Kentucky.*—Sayre v. Louisville Union Benevolent Association, 1 Duv. 143, 85 Am. Dec. 613 (1863).

*Louisiana.*—Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445 (1889).

*New York.*—Hooker v. Vandewater, 4 Denio, 349, 47 Am. Dec. 58 (1847); Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 282 (1848).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. State, 72 Tex. 404, 10 S. W. 81 1888).

Pooling agreements are against the Interstate Commerce Act. In re Pooling Freights, 115 Fed. 588 (1902); Southern Pacific Ry. Co. v. Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585 (1906).

Pooling agreements also fall within the Federal Anti-trust Act. United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007 (1897); United States v. Joint Traffic Association, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259 (1898).

[2] Hare v. London & Northwestern Ry. Co., 2 Johns. & H. 80 (1861).

[3] Manchester & L. R. R. Co. v. Concord R. R. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689 (1889).

In Raritan River R. R. Co. v. Middlesex & S. Traction Co., 70 N. J. L. 732 (1904), it was held that an agreement made between a railroad company and a competitor, that the companies would not re-

Chancellor Wood dismissed the argument that the pooling agreement which was being questioned was against public policy by saying: "It is a mistaken notion that the public is benefitted by pitting two railway companies against each other till one is ruined, the result being, at last, to raise the fares to the highest possible standard." Strong though this argument may be, it must address itself now to the legislative branch; the weight of authority against it at common law is overwhelming.

### *Topic C. Refusal of the Demands of a Rival*

**§ 695. Shipments made by a rival.**

It sometimes happens in the course of competition between two public service companies that one of them may be bold enough to apply to the other for some service it requires in the conduct of its business. It is obvious that we have a delicate matter here. If the competitor can put himself in such a position that he can be said to apply as one of the public might, it is difficult to see how his application can be refused. And yet this may aid him in the course of his business in various ways. For example one railroad may apply to a rival railroad to forward some materials to an intersecting point.[1] It is submitted that it is the clear duty of the railroad to which this application is made to accept the shipment, although it might benefit much this road to which the application is made to cripple its rival by refusing to transport the supplies. For this is true of every public service company that it must accede to every proper application for

duce their present rates for a time fixed unless required by law to do so was not contrary to public policy.

In Averill v. Southern Ry., 75 Fed. 736 (1896), rate wars were deplored; and the suggestion was thrown out that the courts might sometime enjoin them.

[1] See Rogers Locomotive & Machine Works v. Erie Ry. Co., 20 N. J. Eq. 379 (1869).

service, although it might be more profitable to promote its own interests by imposing conditions, or even by refusing altogether.[1]

**§ 696. No obligation to carry packed parcels.**

An excellent illustration of this distinction is Johnson v. Dominion Express Company.[2] Defendant in this action was a general express company, while plaintiff was an association, trading under the name of the National Package Express Company, engaged in forwarding small parcels. This action was brought to compel the defendant to accept from the plaintiff, at the regular schedule rates for large packages, cases containing small parcels, which the plaintiff had collected for transportation from various shippers, to be delivered by them later to various consignees. The court held that the refusal was justifiable. "That a number of persons should combine to carry on a business in competition with the defendant, to take from it the most profitable part of its business; to make use of its capital and facilities for its destruction, cannot be assumed to have been considered or provided for by the company in fixing its present tariff." [3]

**§ 697. Competitor must be taken as a passenger.**

The proposition in the heading is against the apparent doctrine of the well-known case of Jencks v. Coleman,[4]

[1] See also American Banana Co. v. United Fruit Co., 160 Fed. 184 (1908).

[2] 28 Ont. Rep. 203 (1896). The view of the English cases seems to be that if a railway carries packed parcels for forwarders generally it cannot refuse a particular applicant. Crouch v. London & N. W. Ry. Co., 14 C. B. 255 (1854); Baxendale v. So. West Ry. Co., 35 L. J. Exch. 108 (N. S.) (1866).

[3] So a railroad is not bound to accept at the carload rate a shipment got together from various customers by a forwarding agent. Lundquist v. Grand Trunk W. Ry. Co., 121 Fed. 915 (1901).

[4] 2 Sumn. 221, Fed. Cas. No. 7258 (1835).

It is generally admitted that a passenger can be prevented from carrying on a business while on board. See the D. R. Martin, 11

where Mr. Justice Story virtually directed the jury to find against the plaintiff, an agent for a rival line (who was going from Providence down to Newport intending upon the return trip to solicit business on board for his line) upon the general principle that proprietors of steamboats are not "bound to admit passengers on board whose object it is to interfere with the interests or patronage of the proprietors, so as to make the business less lucrative to them." Little exception can be taken to the general principle thus stated; but it would now be recognized that the presiding justice went too far in applying it to the particular case, for the plaintiff was applying as a traveler for this particular journey. According to the present authorities this distinction must be taken. In a late Louisiana case [1] it is pointed out that although a person who is detected in "scalping" tickets while on the train, might be ejected, a person who "scalps" railway tickets elsewhere than on the train cannot be denied transportation over the lines of the railroads in whose tickets he traffics. He is a part of the general public, it was said, and railway companies, as common carriers, must, ordinarily, permit all who pay the regular fare to travel on their trains.

**§ 698. Railroad not compelled to give running rights.**

As has been seen, common carriers by reason of their public duty must serve their rivals who ask as members of the public those things which members of the public might ask; but they can demand no more. The princi-

Blatch. (U. S.) 233, Fed. Cas. No. 1030 (1873), and Runyan v. Central R. Co., 65 N. J. L. 228, 47 Atl. 422 (1900).

[1] Ford v. East Louisiana R. R. Co., 110 La. 414, 34 So. 585 (1903).

The distinction is recognized in other recent cases, such as South Florida R. R. Co. v. Rhodes, 25 Fla. 40, 5 So. 633, 23 Am. St. Rep. 506 (1889), and Phillips v. Southern Ry. Co., 114 Ga. 284, 40 S. E. 268 (1901).

ples discussed do not go so far as to give to one common carrier the right to demand the use of the facilities of rival common carriers in order to compete against them. Thus, it seems plain that one railroad cannot be required to make physical connections with its rival so that it may take its business away from it.[1] Nor is the railroad under any obligation to grant running rights over its trackage to the trains of its rivals. If it makes an arrangement of this sort, it may dictate its own terms; it may even go so far as to require that competitive business shall not be taken. The case which decided this [2] went on the ground that the public retained its original right to have adequate service by the company which owns the rails. Whether even legislation may go so far as to require the giving of running rights is a difficult question of constitutional law. It is probable that if the legislation contains proper provisions for adequate compensation that it is valid.[3] However a strong argument against such meddlesome legislation may be made as the opinion of Mr. Justice Dean in one of the cases opposed to this will show.[4]

### § 699. Obligation to give trackage.

In certain public services, as has been noted, there is an obligation to give trackage rights provided this is the service which is professed. Thus when terminal com-

[1] Jacobson v. Wisconsin M. & P. R. R. Co., 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358 (1898), aff'd *sub nom.* Wisconsin, M. & P. R. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115 (1900).

See also Central S. Y. Co. v. Louisville & N. R. R. Co., 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339 (1904), and Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 29 Sup. Ct. 246 (1909).

[2] Michigan Central R. R. Co. v. Pere Marquette R. R. Co., 128 Mich. 333, 87 N. W. 271 (1901).

[3] Toledo Electric St. Ry. Co. v. Toledo Consolidated St. Ry. Co., 26 Ohio Wk. L. Bul. 172 (1891).

[4] Philadelphia M. & S. Street Ry. Co.'s Petition, 203 Pa. St. 354, 53 Atl. 191 (1902).

panies are organized to receive railways in general they must permit any railway to use their trackage.[1] But if a railroad possesses a terminal of its own it is not obliged to permit other railways to make use of it by demanding rights over its trackage from a connecting point nearby.[2] The general problem now under discussion has arisen as to the obligations of bridge companies to street railways. In the case of the Covington bridge [3] over the Ohio River, the evidence went so far as to show that the bridge company had maintained railway tracks for many years over which various street car lines had run. On these facts the court had no difficulty in holding that the particular appellee had a right to have its cars pass. "This bridge is a highway and dedicated by the company not only to the uses of ordinary travel, but to its use by street railway companies in passing cars over it from one city to the other." This case is not inconsistent with the case of another Ohio bridge [4] in which it is held as to what was apparently a railroad bridge primarily that an electric railway could not insist upon running over the tracks of the steam railroad. "While fully recognizing the well-known doctrine that public service companies are bound to render to the public certain services appropriate to the particular functions of the corporation, that doctrine has not been

[1] *Florida.*—State v. Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221 (1899).

*Maryland.*—Union Railway of Baltimore v. Canton R. R. Co., 105 Md. 12, 65 Atl. 409 (1907).

[2] *Illinois.*—Terre Haute & I. R. R. Co. v. Peoria P. V. Ry. Co., 167 Ill. 296, 47 N. E. 513 (1897).

*Virginia.* — Commonwealth v. Norfolk & W. Ry. Co. (Va.), 68 S. E. 351 (1910).

[3] Covington & C. Bridge Co. v. So. Covington & C. St. Ry. Co., 93 Ky. 136, 19 S. W. 403, 15 L. R. A. 828 (1892). See also Pittsburg & West End Ry. Co. v. Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323 (1894).

[4] Evansville & H. Traction Co. v. Henderson Bridge Co., 134 Fed. 973 (1904), citing Elliott on Railroads, §§ 922, 974, 1084. See Cambridge R. R. Co. v. Charles R. St. Ry. Co., 139 Mass. 454, 1 N. E. 925 (1888).

supposed to reach far enough to make the corporation serve the purposes or be subject to the uses of a mere rival in business. One water company or one telephone company or one telegraph company or one street railway company or one railroad company, while bound appropriately to serve the general public, cannot, unless under express statutory enactment and by due process of law thereunder be compelled to give its property to the uses and benefits of a rival except by some form of condemnation. The rival is not ordinarily to be included in the term general public."

**§ 700. Connections with another telephone system.**

A modern instance of this problem is whether a telephone company must give switch board connection to the lines of a rival system so as to permit through speech. A few years ago it seemed to be law that such connections could not be insisted upon by a rival company any more than a private individual could insist on having his private apparatus connected with the switch board. As was said in one case [1] "The petitioner's rights are to be measured by those secured to an ordinary person, seeking to employ defendant's telephone system." But in later cases legislation specifically compelling such connections for competing companies has been held constitutional.[2] Recently, moreover, there have been common law cases which impose the duty of permitting such through connections when the company in question has once committed itself to such service by permitting such other companies

[1] Matter of Baldwinsville Telephone Co., 24 N. Y. Misc. 221, 53 N. Y. Supp. 574 (1898). And see Rural Home Telephone Co. v. Kentucky & I. Telephone Co., 32 Ky. Law Rep. 1068, 107 S. W. 787 (1908).

[2] Billings Mutual Telephone Co. v. Rocky Mt. Bell Telephone Co., 155 Fed. 207 (1907). Compare Campbellsville Telephone Co. v. Lebaron L. & L. Telephone Co., 118 Ky. 277, 80 S. W. 1114, 84 S. W. 518 (1904).

to connect in certain instances. In one of these cases the court held that while such service was offered there could be no discrimination in granting such connections.[1] Another goes further, it would seem, in refusing to allow the discontinuance of a switch board connection when once established.[2] These cases are probably to be explained by saying they really present an extension of the doctrine of connections rather than a true case of utilization of facilities. To draw an analogy, they seem more like the case of demanding of a connecting railway through carriage in the original cars than of asking running rights for through trains.

**§ 701. Utilization of the waterworks of another.**

Another instance of this same law is to be found in those decisions which hold that an irrigation company need not enter into arrangements with a rival company which wishes to connect with the system in promotion of its own service.[3] And a rival system cannot even under general

[1] United States Telephone Co. v. Central Union Telephone Co., 171 Fed. 130 (1909). And see Cumberland Telephone & T. Co. v. Cartwright C. Telephone Co., 128 Ky. 395, 108 S. W. 875 (1908).

[2] State ex rel. v. Cadwallader (Ind.), 87 N. E. 644 (1909). See further Home Telephone Co. v. North Manchester Telephone Co. (Ind. App.), 92 N. E. 558 (1910).

That a telephone company was engaged in transmitting long-distance telephone communications, and therefore came into competition to some extent with a telegraph company, did not justify a discriminating charge for telephone service furnished the telegraph company as legitimate competition. Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co., 177 Fed. 726 (1910).

For the A telephone company to contract with the B telephone company for exclusive toll business in sending messages over the lines of the C telephone company to patrons of the B company who could be reached over its lines (with the result that such patrons would be compelled to go to public stations and pay messengers) was held to be a wrong to the public which could form the basis for an injunction. Home Telephone Co. v. North Manchester Telephone Co. (Ind. App.), 92 N. E. 558 (1910).

[3] Paxton & H. Irr. Canal & L. Co. v. Farmers' & M. I. & L. Co., 45

enabling legislation insist upon the enlargement of the present ditches of another company.[1] In both of these cases the rival company might seem at first sight perhaps to be only asking what a private taker might have demanded. But since it appeared that what was really on foot was a scheme by one supplying company to utilize the works of another, it was properly decided that the service asked could be refused. Upon similar principles a waterworks company may refuse to supply water upon the large consumer basis to a taker who intends to distribute it to various buildings.[2] But such arrangements may be made voluntarily.[3]

**§ 702. Gas works not bound to supply rivals.**

The most remarkable case in this series is Public Service Corporation v. American Lighting Company.[4] The plaintiff corporation was the owner of the established gas works in Jersey City from which it was accustomed to light the streets of the city under contract. The defendant corporation was simply the proprietor of a gas burner which it wished to introduce for street lighting. This being the state of affairs, the city of Jersey City on December 1st, 1904 advertised as usual for bids for lighting the city for the next year. The bid of the American Lighting Company being much the lowest, the contract was awarded to it. Thereupon it demanded from the Public Service

Neb. 884, 64 N. W. 334, 29 L. R. A. 353, 50 Am. St. Rep. 585 (1895).

[1] Junction Creek & N. D. D. & I. Ditch Co. v. Durango, 21 Colo. 194, 40 Pac. 356 (1895).

[2] United States v. American Waterworks Co., 37 Fed. 747 (1889).

But it has been held that a concern which has a water contract may sell its surplus at a profit. Mayor, etc., of Halifax v. Local Board, 30 L. T. (N. S.) 513 (1874).

[3] Voluntary arrangements may be entered into for the provision of water through an intermediary. See:

*Georgia.*—Milledgeville Water Co. v. Edwards, 121 Ga. 555, 49 S. E. 621 (1904).

*Missouri.*—Mulrooney v. Obear, 171 Mo. 613, 71 S. W. 1019 (1903).

[4] Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482 (1904).

Corporation a supply of gas delivered at the top of every lamp-post in Jersey City, sufficient to supply one light one night at each. But when the case was brought before the Vice Chancellor he held that a competitor corporation making such demands was asking what the established company owed to no one in its position.[1]

*Topic D. Promotion of a Collateral Business*

**§ 703. Right to engage in a collateral business.**

The recognition of the limitations upon the rights of one engaged in a public employment if he enters into competition with members of the public in a business in which his own services are necessary, constitutes one of the latest developments in the public service law. This law might, perhaps, have been anticipated by the strict construction given to railroad charters. Wherever the question was arguable the court would invariably decide that the collateral business was *ultra vires*. Thus in Illinois [2] it was held *ultra vires* for a railroad to maintain a grain elevator, on the ground that the public duties of a railroad company forbade this monopolization of the warehouse business. And in an English case [3] a railroad which was absorbing the coal business along its route was held to be acting *ultra vires*. This was squarely put upon public policy, the fear being expressed that once started in such a career railroads conceivably might monopolize all business.

**§ 704. Telephone company favoring its messenger service.**

Where a public service company engages itself in another collateral business the temptation always is to use

[1] The same decision between the same parties as to the same matter was reached in American Lighting Co. v. Public Service Co., 132 Fed. 794 (1904).

[2] People ex rel. v. Illinois Central R. R. Co., 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181 (1908).

[3] Attorney-General v. Great Northern R. R. Co., 29 L. J. Eq. (N. S.) 794 (1860).

the power in its public businesses to promote its collateral business. An illustration of this appears in the case of Louisville Transfer Company v. American District Telegraph Company.[1] Plaintiff in that case was a transfer company providing omnibuses and other carriages. Defendant was a telephone company which also conducted a carriage and coupé service. To promote that business it refused to give full telephone service to the plaintiff, so that people might not call the plaintiff and order carriages. Edwards, the Chancellor puts the objection to this very well indeed: "It is the opinion of the court that defendant is engaged in two distinct employments—one in operating a telephonic exchange, and the other in operating a carriage or coupé service. Plaintiff and defendant are not rivals in the former business and, as to that part of defendant's business, it occupies the same position toward plaintiff as it does toward the rest of the public; the defendant is a quasi-public servant, and as such, is bound to serve the general public, including the plaintiff on reasonable terms with impartiality." [2]

[1] 1 Ky. L. J. 144 (1881).

Electric Despatch Co. v. Bell Telephone Co., 20 Can. Sup. Ct. 83 (1891), and also People ex rel. Postal Tel. Co. v. Hudson River Telephone Co., 19 Abb. N. C. 466 (1887), both *accord*.

[2] That a telephone company also furnished telegraph service did not authorize it to charge discriminating rates for telephone service furnished to a competing telegraph company in order to enlarge the profits derived from the telegraph part of its business. Postal Cable Telegraph Co. v. Cumberland Telephone & Telegraph Co., 177 Fed. 726 (1910).

When the plaintiff, who was engaged in a general messenger business, had a contract with the defendant telephone company for the use of its telephone in his place of business, the defendant had no right to refuse to permit the telephone to be used in calling up the plaintiff to order a messenger sent to inform a party that he was wanted at a station of a rival telephone company. This policy of the telephone company was held to be contrary to the duty owed to the whole public using their system. Owensboro Harrison Telephone Co. v. Wisdom, 23 Ky. L. Rep. 97, 62 S. W. 529 (1901).

**§ 705. Municipality promoting its water service.**

An equally extreme case of unfair action may be seen in Mobile v. Bienville Water Supply Company.[1] In that case it was shown that the city, the original defendant, had constructed a sewerage system and at the same time had constructed waterworks. The city never fixed any rate for the use of its sewers alone, but it would not allow any takers of complainant's water to connect with or use its sewers, except at the same price as the city charged for both its water and sewers together, in effect forcing its citizens and inhabitants to take the water of the city, or to pay for the water of complainant in addition to what each citizen would have to pay for the city's water and sewerage together. Obviously this was unfair competition, because in defiance of the public duty of the city to give either service at a fair rate. The language of Mr. Justice Harelson in granting the injunction is well worth quoting: "Whether intended by the city to so operate or not, one can scarcely conceive of a more effective scheme to deprive the complainant of its customers than the one alleged in the bill. If complainant has to furnish its customers with water, and they are required by the city to pay for sewerage the same price it charges its own customers for its water and sewerage, it follows the complainant would have to furnish water practically free or abandon the business; for it would be unreasonable to suppose that anyone would use the complainant's water and bear the additional expense imposed for so doing." [2]

**§ 706. Electric company favoring its wiring department.**

Another case of the abuse of its power by a public serv-

[1] 130 Ala. 379, 30 So. 445 (1900). See also Hamilton City v. Hamilton Gas L. & C. Co., 11 Ohio Dec. 513 (1901).

[2] Upon similar principles it has been held that a gas company supplying gas for both illumination and fuel cannot make a lower rate for illuminating gas to those of its customers who will take gas for fuel also. Baily v. Fayette Gas Fuel Co., 193 Pa. St. 175, 44 Atl. 251 (1899).

ice company to promote a collateral branch of its business was decided recently in Illinois, Snell v. Clinton Electric Light, Heat, and Power Company.[1] The defendant company in that case charged the plaintiff who had applied for electricity an additional price for a transformer, in pursuance of their policy openly announced to supply transformers free to those who had the wiring of their houses done by the company's own wiring department, but to charge applicants like the plaintiff who had their wiring done by other parties the full price of the transformer. This transformer was a necessary part of the system of distributing electricity for the protection of the consumer. Upon this showing the highest court held that the treatment of the plaintiff by the defendant was unjustifiable. Mr. Justice Carter said: "It is entirely immaterial who does the wiring of the house—the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes, just as the putting in of gas and water pipes into a house is a distinct business from furnishing the gas or water to flow through them.[2]

**§ 707. Railroad cutting its own rates for itself.**

This development which is going on in the law was brought to the attention of all not long ago by a striking decision handed down by the United States Supreme Court in regard to the coal roads, New York, New Haven & Hartford Railroad v. Interstate Commerce Commission.[3]

[1] 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341 (1902).

[2] Upon similar principles it is held that a water company cannot establish an official plumbing service and require that all piping shall be done by it; but it can for its own protection reserve the right to tap its own mains. See Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518 (1900), and Keen v. Mayor & Council of Waycross, 101 Ga. 588, 29 S. E. 42 (1897).

[3] 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. 272 (1906). See also In-

The complaint in that case was filed by the attorney-general under the provisions of the Interstate Commerce Act, which forbid discrimination between shippers, charging that traffic was being moved at less than the published rates. It was shown that the Chesapeake and Ohio Railroad had sold to the New York, New Haven and Hartford Railroad sixty thousand tons of coal to be delivered to the buyer at $2.75 per ton; and it was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for such carriage was $1.45 per ton. Mr. Justice White, who wrote the opinion of the court, puts the matter well when he says: "If by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. The existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal." [1]

terstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. 563 (1904).

A fruit corporation operating a line of steamships cannot discriminate against one of its rivals in the fruit business. American Banana Co. v. United Fruit Co., 160 Fed. 184 (1908).

[1] When a canal is owned by a cement company it cannot make discriminatory rates against another cement company. New York Cement Co. v. Consolidated Rosen-

**§ 708. Grain elevators storing their own grain.**

But some courts are disposed to go one step further yet and to say that it may be inconsistent with public service for the public servant to engage at all in the outside business and to make use of his own facilities in conducting it. A square decision in point is Central Elevator Co. et al. v. People [1] where perpetual injunctions were granted to restrain defendants, as warehousemen, from storing grain in their own warehouses. Cartwright, the justice who wrote the opinion, said in part: "The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty towards the public. The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers, by exacting from them the established rate for storage, while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators the position of equality between them and the public whom they are bound to serve is destroyed, and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world." [2]

**§ 709. Constitutionality of statutory prohibition.**

There is then this general feeling abroad, that for a public service company to engage in serving itself in a

dale Cement Co., 178 N. Y. 167, 70 N. E. 451 (1904).

And a gas company cannot make special rates to its own stockholders. Redkey C. Nat. Gas. L., F. & P. Co. v. Orr, 27 Ind. App. 1, 60 N. E. 716 (1901).

[1] 174 Ill. 203, 51 N. E. 254, 43 L. R. A. 658 (1898).

[2] *Accord*, Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902). A more extreme case, holding an act passed to enable the warehouses to do what was provided in this decision, unconstitutional because against the clauses declaring warehouses public.

collateral business is inconsistent with its full performance of its public duties; and clear evidence of this public opinion is the "Commodities Clause" added in 1906 to the Interstate Commerce Act by which it was provided generally that a carrier should not transport after 1908 any commodities owned by it that it had produced. It is true that the United States Supreme Court has recently [1] construed the statute so that it does not apply to commodities owned by a corporation controlled by the carrier. But while deciding this, as to the particular act, the court affirmed the power of the Legislature to regulate carriers to the extent of forbidding them to transport goods in which they had an interest. Such legislation is due process of law because it does not go much beyond what are the accepted principles of regulation embodied in the public service law itself.[2]

**§ 710. Argument for radical law.**

This at least may be regarded as conceded, that a public service company if engaged in private business for itself dependent upon the service it conducts ought not to prefer itself to its competitors in business among the general public who have already made application for service. But a position has already been taken far beyond this proposition; it is now urged that those who are undertaking a public service ought not to be allowed to engage in private business in competition with those whom they are professing to serve unless matters may be so arranged that the competition shall be upon equal terms. And in general it should be said, as this position that the same busi-

[1] United States ex rel. v. Delaware & Hudson Co., 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. 527 (1909).

[2] The law is not to be circumvented by having title to the coal pass to the buyer at the railroad's mine so that it is not the property of the railroad while being transported. Central Trust Co. v. Pittsburg S. & N. R. R. Co., 52 N. Y. Misc. 195, 101 N. Y. Supp. 837 (1906).

ness policies are justifiable in public employments as in private enterprises is taken with such confidence at times, that it is most necessary that those who are conducting the public services should be told in so uncompromising a manner that they may realize at length its full significance, that, while those who conduct private enterprises may use many schemes, those who profess a public employment must not adopt any business policies which are in any way truly inconsistent with their public duties. And it may very probably turn out that it will be found necessary for the maintenance of the highest type of public service to forbid those who undertake such callings from engaging at all in business of their own where their interests might come in conflict with the interests of those whom they are serving.

# BOOK III. CONDUCT OF PUBLIC EMPLOYMENT

# PART V. COMMENCEMENT OF SERVICE

## CHAPTER XXI

### BEGINNING OF THE UNDERTAKING

§ 720. Commencement of the relation.

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**§ 720. Commencement of the relation.**

It is often of the greatest importance to determine whether the service undertaken has actually been begun. This problem has two aspects, as the usual extent of the service in general and the particular action taken in the service in question must both be considered. What is the usual extent of the service in general has already been considered at length under the general discussion of public profession. The question remains whether in the particular case the relationship has been established by the undertaking of the service asked. As will be seen in this chapter the question of acceptance is rather a question of fact than of law; and for this reason little more is attempted in this connection than to bring forward a few authorities from the innumerable cases bearing upon this subject. Moreover this matter is primarily a problem of the general law of bailment more than of the peculiar law of public service. At the same time the problem of the extent of the public undertaking assumed necessarily involves an inquiry as to the very point at which that service may properly be said to have been begun upon a public basis.

*Topic A. When Public Service is Begun*

**§ 721. Position of Prospective Customers.**

To state the first requisite to the beginning of the relationship in simplest terms, it is necessary in order to bring the relation about that the parties to it shall be brought together. The individual must properly present himself; and his application must be duly accepted. The first part of this statement, that the applicant must conform to all conditions precedent in order to be in a position to

demand service, has been fully discussed already in a former chapter. To bring that matter again to mind it is sufficient to revert to those cases which hold that until the shipper has tendered his goods for transportation the relationship has not been established as yet although the carrier is awaiting him.[1] And even when he has conformed to every requirement which can be made of him, the fact remains that unless he may properly be said to have been accepted the relationship has not come about.[2] He may complain of being refused service; but he has not the rights of one with whom the relationship has been established.

**§ 722. Requisitions made for service.**

Still, whenever service is presently desired an arrangement may properly be made in advance so that the facilities may be at hand at the time desired. Thus a shipper intending a considerable shipment in car lots may apply a reasonable time in advance to the railroad, particularly requesting a certain mumber of cars in readiness for certain freight at a certain day and at a certain station.[3] This does not seem to be a premature application even upon the general common-law principles; and there are

[1] See, for one example, Illinois & St. L. R. R. & Coal Co. v. People, 19 Ill. App. 141 (1886).

[2] See, for one example, Yoakum v. Dryden (Tex. Civ. App.), 26 S. W. 312 (1894).

[3] See on the general principle:

*Illinois.*—Chicago & Alton R. R. Co. v. Erickson, 91 Ill. 613, 33 Am. Rep. 70 (1879); Illinois Central R. R. Co. v. Bundy, 97 Ill. App. 202 (1901).

*Indiana.*—Lake Shore & M. S. Ry. Co. v. Anderson, 39 Ind. App. 112, 79 N. E. 381 (1906); Pittsburg, C., C. & St. L. Ry. Co. v. Wood (Ind. App.), 84 N. E. 1009 (1908).

*Maryland.*—Di Giorgio Imp. & S. S. Co. v. Pennsylvania R. R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108 (1906).

*New York.*—Tierney v. New York C. & H. R. R. R. Co., 76 N. Y. 305 (1879).

*Wisconsin.*—Ayres v. Chicago & Northwestern Ry. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 (1888).

many statutes upon this common law basis.[1] Indeed it is generally held as to car shipments that when a shipper requires a car at a railroad station for his exclusive use, he must necessarily give notice to the railroad company, after which it will have a reasonable time in which to furnish the car.[2] A correlative duty rests upon the railroad to notify the applicant if by reason of unexpected press of business the cars asked for cannot be furnished in usual time.[3]

**§ 723. Actual agreement must be shown.**

An actual agreement must be shown in such cases.[4] A mere promise by a carrier to furnish facilities to ship the goods is not enough;[5] nor is a mere order by a shipper for cars standing alone sufficient.[6] And there is no obligation in the case of the mere option to make shipments within the time or in the quantity desired by the shipper.[7] It is necessary that the intending shipper should at least commit himself to an arrangement binding himself to the payment of the freight involved,[8] if the carrier is content with that; else he must pay down the freight unless the

[1] See construing such statutes:

*United States.*—Houston & T. C. R. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. 491 (1906).

*North Carolina.*—McDuffie v. Seaboard Air Line Ry. Co., 145 N. C. 397, 59 S. E. 122 (1907).

*Texas.*—Texas & P. Ry. Co. v. Barrow, 33 Tex. Civ. App. 611, 77 S. W. 643 (1903); Texas & P. Ry. Co. v. Blocker, 48 Tex. Civ. App. 100, 106 S. W. 718 (1907).

[2] Illinois Central R. R. Co. v. Bundy, 97 Ill. App. 202 (1901).

[3] Pittsburg, C., C. & St. L. Ry. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853 (1892).

[4] Reed v. Philadelphia, W. & B. R. R. Co., 3 Houst. 176 (1865).

[5] Southern Ry. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144 (1901).

[6] Missouri Pacific Ry. Co. v. Texas & P. Ry. Co., 31 Fed. 864 (1887).

[7] *Missouri.*—White v. Missouri Pac. Ry. Co., 19 Mo. App. 400 (1885).

*New York.*—Chicago & G. E. Ry. Co. v. Dane, 43 N. Y. 240 (1870).

[8] *Arkansas.*—Little Rock & Ft. Smith Ry. Co. v. Conatser, 61 Ark. 560, 33 S. W. 1057 (1896).

*New York.*—Chicago & G. E. Ry. Co. v. Dane, 43 N. Y. 240 (1870).

statute provides for a partial deposit. And since the intending shipper must rely upon a special agreement, he must show that his application was made to an agent of the company having apparent authority to make the arrangement. Thus a station agent has authority to make a contract to furnish cars at his station on a certain day; [1] it is not necessary to go higher up and notify a superintendent.[2] But a notice given to a train master or a train crew would not be sufficient.[3] A tender and refusal must be shown.[4] But this may be waived by a repudiation of the contract.[5]

**§ 724. Acceptance as common carrier.**

A carrier of goods is a bailee of the goods for the purpose of carriage; and his responsibility as carrier cannot begin until he has become a bailee. And since possession of the bailee is the gist of the bailment, the carrier's responsibility does not begin until the moment when he assumes possession. But the carrier's liability begins at once on the receipt of goods for transportation,[6] though the goods have not yet been placed in the carrier's vehicle for trans-

[1] *Arkansas.*—St. Louis, I. M. & So. Ry. Co. v. Taylor, 87 Ark. 331, 112 S. W. 745 (1908).

*Texas.*—McCarty v. Gulf, C. & S. F. Ry. Co., 79 Tex. 33, 15 S. W. 164 (1890).

[2] Hoffman H. & S. Co. v. St. Louis, I. M. & S. Ry. Co., 119 Mo. App. 495, 94 S. W. 597 (1906).

[3] St. Louis, I. M. & S. Ry. Co. v. Moss, 75 Ark. 64, 86 S. W. 828 (1905).

[4] *Arkansas.*—St. Louis, I. M. & S. Ry. Co. v. Lee, 69 Ark. 584, 65 S. W. 99 (1901).

*North Carolina.*—Currie v. Raleigh, etc., R. R. Co., 135 N. C. 535, 47 S. E. 654 (1904).

[5] *Arkansas.*—Little Rock & Ft. Smith Ry. Co. v. Conatser, 61 Ark. 560, 33 S. W. 1057 (1896).

*Indiana.*—Louisville, N. A. & C. Ry. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674 (1887).

*Vermont*—Wilder v. St. J. & L. C. R. R. Co., 66 Vt. 636, 30 Atl. 41 (1891).

*Wisconsin.*—Doty v. Strong, 1 Pin. 313, 40 Am. Dec. 773 (1843).

[6] See in support of this:

*Massachusetts.*—Nichols v. Smith, 115 Mass. 332 (1874).

*New York.*—Rogers v. Wheeler, 52 N. Y. 262 (1873).

portation,[1] and even though no bill of lading has been issued for them,[2] and the freight has not been prepaid.[3] That is, the liability of the carrier as such depends upon his possession, with the obligation to transport and the right to transport immediately.[4] Thus where goods are offered to a railroad company at an unreasonably long time before the train starts, if the carrier takes the goods he becomes responsible at once as a carrier, although the shipper knows that according to the time-table the goods will not be carried until a later time.[5] And where a horse was delivered to a railway before the train was prepared, and was put by the railway company into a horse box and killed before it was put on board the train, the railway was held liable.[6]

**§ 725. Reception as a guest.**

In innkeeping, the other calling in which this is of real importance, similar law is followed. When a traveler comes to an inn and is received by the innkeeper for the purpose of entertaining him during his journey, the rela-

[1] To this effect see:

*Illinois.*—Grand Tower M. & Transp. Co. v. Ullman, 89 Ill. 244 (1878).

*Massachusetts.*—Fitchburg & W. R. R. Co. v. Hanna, 6 Gray, 539, 66 Am. Dec. 427 (1856).

*New Hampshire.*—Moses v. Boston & Maine R. R. Co., 24 N. H. 71, 55 Am. Dec. 222 (1851).

*New York.*—Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75 (1856).

[2] These cases, among others, support the text:

*United States.*—Show v. Carruth, 1 Sprague, 324 (1856).

*Texas.*—East Line & Red River Ry. Co. v. Hall, 64 Tex. 615 (1885).

[3] Examples of cases of this sort are:

*Illinois.*—Woods v. Devin, 13 Ill. 746, 56 Am. Dec. 483 (1852).

*Indiana.*—Evansville & T. H. R. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296 (1893).

[4] *United States.*—Louisville & N. R. R. Co. v. United States, 39 Ct. of Cl. 405 (1904).

*Pennsylvania.*—Clarke v. Needles, 25 Pa. 338 (1855).

[5] Hickox v. Naugatuck R. R. Co., 31 Comm. 281, 83 Am. Dec. 143 (1863). See also Camden & A. R. R. Co. v. Belknap, 21 Wend. (N. Y.) 354 (1839).

[6] Moffat v. Gt. Western R. R. Co., 15 L. T. (N. S.) 630 (1867).

tion of host and guest is thereby established.[1] No lapse of time is required for the establishment of this relation; if the guest presents himself for entertainment and is accepted, the relation "is instantly established between them." [2] A traveler may, however, enter a public room at an inn without at once presenting himself as a guest; and in such case the relation of host and guest is not established between the innkeeper and himself. So a traveler who enters a public room of an inn for a temporary purpose without intending to lodge or be otherwise entertained at the inn is not a guest.[3] To be received at an inn the guest must usually communicate with the innkeeper or with some servant authorized to receive the guests.[4] Not only must the guest communicate his intention to the innkeeper; the latter must consent to receive him as a guest.[5] If the innkeeper refuses to receive a person as a guest, whether the refusal is legal or illegal, the relation is not established. Therefore when an innkeeper refuses to receive a guest whether justifiably because his house is full, or unjustifiably, such person cannot, by placing his property in the inn, make the innkeeper liable for it.[6]

### § 726. Goods withheld from transportation.

Even after a relationship has been entered into it may by understanding of the parties be of a preliminary character, the regular service not to be begun as yet. This is

[1] *California.*—Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657 (1867).

*Maine.*—Healey v. Gray, 68 Me. 489, 28 Am. Rep. 80 (1878).

*Minnesota.*—Ross v. Mellin, 36 Minn. 421, 32 N. W. 172 (1887).

[2] *Maine.*—Norcross v. Norcross, 53 Me. 163 (1865).

*Minnesota.*—Ross v. Mellin, 36 Minn. 421, 32 N. W. 172 (1887).

[3] Gastenhofer v. Clair, 10 Daly, 265 (N. Y., 1881).

[4] Bernard v. Lalonde, 8 Leg. News, 215 (Can., 1885).

[5] Brewer v. Caswell, 132 Ga. 563, 64 S. E. 674, 23 L. R. A. (N. S.) 1107 (1909).

[6] Bird v. Bird, 1 And. 29, Benl. & D. 60 (Eng., 1558); Bennett v. Mellor, 5 T. R. (Eng., 1793) 273.

of chief importance in respect to the carriage of goods, the law holding the common carrier while acting simply as warehouseman of the goods until the time comes for transportation, responsible, as those in any private businesses are, simply for due care, while after that time comes he is held responsible as a public carrier to the liability for an insurer, as will be seen later. When, therefore, goods are received by the carrier, not for immediate transportation, but to be held until further orders of the shipper, the carrier holds the goods, pending such orders, as a warehouseman, not as a carrier.[1] Thus where shipping directions are to be sent later, the carrier until such directions are received, holds the goods as a warehouseman only.[2] And where although the goods are in control of the carrier something more is to be done to them by the shipper, the carrier is still a warehouseman only; [3] and so where the goods are not to go until the shipper appears to accom-

[1] *Massachusetts.*—Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126 (1868).

*Michigan.*—Michigan Southern & N. I. R. R. Co. v. Shurtz, 7 Mich. 515 (1859).

*New Hampshire.*—Moses v. Boston & Maine R. R. Co., 24 N. H. 71, 55 Am. Dec. 222 (1851).

*New York.*—Rogers v. Wheeler, 52 N. Y. 262 (1873).

*Ohio.*—Pittsburg, C. & St. L. Ry. Co. v. Barrett, 36 Ohio St. 448 (1881).

*Wisconsin.*—Schmidt v. Chicago & N. W. Ry. Co., 90 Wis. 504, 63 N. W. 1057 (1895).

*England.*—White v. Humphrey, 11 Q. B. 43 (1847).

[2] *Illinois.*—St. Louis, A. & T. H. R. R. Co. v. Montgomery, 39 Ill. 335 (1866).

*Massachusetts.*—Fitchburg & W. R. R. Co. v. Hanna, 6 Gray, 539, 66 Am. Dec. 427 (1856).

*Michigan.*—Michigan So. & N. I. R. R. Co. v. Shurtz, 7 Mich. 515 (1859).

*Missouri.*—Goodbar v. Wabash Ry. Co., 53 Mo. App. 434 (1893).

*New York.*—Spade v. Hudson R. R. R. Co., 16 Barb. 383 (1853).

*North Carolina.*—Basnight v. Atlantic & N. C. R. R. Co., 111 N. C. 592, 16 S. E. 323 (1892).

*Canada.*—Milloy v. Grand Trunk Ry. Co., 21 Ont. App. 404 (1894).

[3] *United States.*—St. Louis, I. M. & S. Ry. Co. v. Knight, 122 U. S. 79, 30 L. ed. 1077, 7 S. Ct. 1132 (1887).

*Alabama.*—Alabama Great Southern R. R. Co. v. Mt. Vernon Co., 84 Ala. 173, 4 So. 356 (1887).

*Dakota.*—Mulligan v. Northern

pany them, the carrier is not as yet liable as such.[1] One of the cases that was particularly plain was where for the shipper's convenience the carrier received goods into his warehouse before the opening of navigation.[2] Another was where a railroad had been seized by the government for the transportation of troops and goods were accepted to be held until the government relinquished control of the railroad.[3] And in general where the goods are to be transported at a certain time named the carrier will hold them as a warehouseman until that time, and as carrier as soon as the stated time arrives.[4] But if the goods are detained before transportation, not by request of the shipper, but from his failure to furnish legible or adequate shipping directions, the carrier, not being able to transport at once, is responsible only as a warehouseman.[5]

**§ 727. Goods at carrier's disposal.**

By the general rule if the goods have been taken into the possession of the carrier for immediate despatch with proper shipping directions, he then becomes liable as a common carrier although transportation has not begun.[6]

Pacific Ry. Co., 4 Dak. 315, 29 N. W. 659 (1886).

*Georgia.*—Dixon v. Central of Ga. Ry. Co., 110 Ga. 173, 35 S. E. 369 (1899).

*Massachusetts.*—Judson v. Western R. R. Corp., 4 Allen, 520, 81 Am. Dec. 718 (1862).

*Michigan.*—Stapleton v. Grand Trunk Ry. Co., 133 Mich. 187, 94 N. W. 739 (1903).

*New York.*—Wade v. Wheeler, 3 Lans. 201 (1870).

*England.*—Cairns v. Robins, 8 M. & W. 258 (1841).

[1] Little Rock & Ft. Smith Ry. Co. v. Hunter, 42 Ark. 200 (1883).

[2] Ham v. McPherson, 6 Upp. Can. Q. B. (O. S.) 360 (1871).

[3] Illinois Central R. R. Co. v. Ashmead, 58 Ill. 487; Illinois Central R. R. Co. v. Hornberger, 77 Ill. 457 (1875).

[4] Illinois Central R. R. Co. v. Tronstine, 64 Miss. 834, 2 So. 255 (1887).

[5] O'Neill v. New York Central & H. R. R. R. Co., 60 N. Y. 138 (1875).

See also Campion v. Canadian Pacific Ry. Co., 43 Fed. 775 (1890).

[6] This general principle is shown by the following cases:

*United States.*—St. Louis, I. M.

If the carrier delays transportation thereafter to suit his own convenience, that is no affair of the shipper. And this will be true even if something remains to be done by the carrier, as the issue of a bill of lading.[1] But if there is an agreement whereby the goods placed in the carrier's care are to be held until he chooses to begin transportation,[2] the rule is otherwise. On this principle it has been held that where cattle were by the permission of a railroad company placed in its pens by the shipper's servants and remained in their charge, the carrier had not become responsible.[3] And the same decision was reached in a case where the shipper retained the right to remove the cattle from the pens to feed and water them.[4] And it has

& S. Ry. Co. v. Knight, 122 U. S. 79, 30 L. ed. 1077, 7 Sup. Ct. 1132 (1887).

*Connecticut.*—Merriam v. Hartford & N. H. R. R. Co., 20 Conn. 354, 52 Am. Dec. 344 (1850).

*Illinois.*—Grand Tower M. & Transp. Co. v. Ullman, 89 Ill. 244 (1878).

*Indiana.*—Louisville, N., A. & C. Ry. Co. v. Godman, 104 Ind. 490, 4 N. E. 163 (1885).

*Minnesota.*—Shaw v. Northern Pac. R. R. Co., 40 Minn. 144, 41 N. W. 548 (1889).

*Missouri.*—Mason v. Missouri Pac. Ry. Co., 25 Mo. App. 473 (1887).

*New Hampshire.*—Moses v. Boston & Maine R. R. Co., 24 N. H. 71, 55 Am. Dec. 222 (1851).

*New York.*—Ames v. Fargo, 114 App. Div. 666, 99 N. Y. Supp. 994 (1906).

*Pennsylvania.*—Clarke v. Needles, 25 Pa. 338 (1855).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Trawick, 80 Tex. 270, 15 S. W. 568, 19 S. W. 948 (1891).

[1] See to this effect the following recent cases:

*Arkansas.*—Garner v. St. Louis, I. M. & S. Ry. Co., 79 Ark. 353, 96 S. W. 187, 116 Am. St. Rep. 83 (1906).

*Michigan.*—Meloche v. Chicago, M. & St. P. Ry. Co., 116 Mich. 69, 74 N. W. 301 (1898).

*North Carolina.*—Berry v. Southern Ry. Co., 122 N. C. 1002, 30 S. E. 14 (1898).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Compton (Tex. Civ. App.), 38 S. W. 220 (1896).

[2] Fitchburg & W. R. R. Co. v. Hanna, 6 Gray (Mass.), 539, 66 Am. Dec. 427 (1856), *semble.*

[3] Fort Worth & D. C. Ry. Co. v. Riley (Tex. App.), 1 S. W. 446 (1886).

[4] Chicago, B. & Q. R. R. Co. v. Powers, 73 Neb. 816, 103 N. W. 678 (1905).

even been held [1] that when a shipment is being delivered to the carrier he does not become liable as such until the whole shipment is delivered, although he might, if he had chosen, forwarded it in parcels as delivered. It should be added that the receipt of goods by a common carrier raises the presumption that he takes them as such.[2] But of course if the goods are taken by a warehouseman even although such warehouseman is associated with the carrier in the service the presumption is otherwise.[3]

**§ 728. Conditional acceptance.**

Another possibility, although the case is rare, is that of a conditional responsibility. The most significant cases on this point deal with the receipt of baggage. If, for example, his baggage is received at a station before the traveler arrives the railroad is liable from the outset as a common carrier, provided he soon presents himself as a passenger, even if no ticket has been bought in advance; [4] but if the owner fails to accompany his baggage the railroad ceases to be a common carrier *ab initio*. In like manner, where the traveler gave his luggage to the porter of the inn at the railroad station, and the porter carried it to the inn, but the owner never became a guest, it was held that the innkeeper never became responsible for it as innkeeper.[5] In this case it will be noticed that if the traveler had come, the special responsibility for the goods would have dated from the moment when possession was

[1] Watts v. Boston & Lowell R. R. Corp., 106 Mass. 466 (1871). But see Shaw v. Northern Pac. R. R. Co., 40 Minn. 144, 41 N. W. 548 (1889).

[2] Berry v. Southern Ry. Co., 122 N. C. 1002, 30 S. E. 14.

[3] Reed v. Wilmington Stb. Co., 1 Marv. (Del.) 193, 40 Atl. 955 (1893). But see Arthur v. Texas & P. Ry. Co., 204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. 338 (1907).

[4] Lake Shore & M. S. Ry. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319 (1885).

[5] Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113 (1904).

taken, but as the owner never came, the special liability was canceled. In other words, during that period the degree of responsibility is doubtful, and it is settled only by the event.

*Topic B. How the Relationship is Established*

**§ 729. Evidence of actual acceptance necessary.**

To establish the creation of the relationship between the proprietor and his customer in all cases there must be evidence from which the fact of actual acceptance on behalf of the proprietor may be shown. Thus the deposit of goods, beside a railroad track, as upon a platform provided to receive them, though they are so deposited for immediate shipment ready to be loaded upon the freight train when it arrives, is not, in the absence of special custom, enough to render the carrier liable.[1] For as a general rule in the absence of an agreement or custom, placing goods in the place where the carrier usually receives them does not render the carrier liable as such.[2] Of course the case is correct which held that a delivery to a railroad warehouse, about dark, and after it was closed and locked for the night, by plaintiff's agent, by opening the upper door and thereby putting the goods in, there being no one in charge, did not show such delivery as would charge the railroad.[3] And equally obvious is the case [4] which decides that loading goods on a car standing on a side track does not constitute a delivery to the rail-

[1] *Georgia.*—Wilson v. Atlanta & C. Ry. Co., 82 Ga. 386, 9 S. E. 1076 (1889).

*North Carolina.*—Wells v. Wilmington & W. R. R. Co., 6 Jones L. (N. C.) 47, 72 Am. Dec. 556 (1858).

[2] *New York.*—Grosvenor v. New York Central R. R. Co., 39 N. Y. 34 (1868).

*Texas.*—Missouri, K. & T. Ry. Co. v. Beard, 34 Tex. Civ. App. 188, 78 S. W. 253 (1904).

[3] Spofford v. Pennsylvania R. R. Co., 11 Pa. Super. Ct. 97 (1904).

[4] Yoakum v. Dryden (Tex. Civ. App.), 26 S. W. 312 (1894).

road company, where the station agent, on being notified thereof, declines to ship the goods, and there is no custom or regulation of the railroad company making such loading a delivery.

**§ 730. Notice not enough in itself.**

In these cases there is some authority for holding that a deposit in the regular place for receiving goods followed by notice to the carrier is enough to make the carrier responsible as such, even without proof of a special custom to that effect.[1] In one case it was even said that in such a case the goods were in possession of the carrier as warehouseman until notice, and thereafter in his possession as carrier.[2] This is an untenable contention which, another court said, no one would make.[3] The true doctrine seems to be that mere notice could not in such a case impose liability on the company; although acquiescence of an authorized servant of the company at the time of receiving the notice would amount to an express acceptance of the goods. So if the carrier is in the habit of issuing checks for trunks upon taking them, it is not good delivery to leave a trunk at the baggage room door without getting a check.[4] On the other hand it is well agreed that where the usual notice is given the facts may show customary acceptance as where a baggage transfer company put the guest's baggage on the platform of the hotel and shouted "baggage"[5] or on the sidewalk in front of the hotel and rang the porter's bell.[6]

[1] Rogers v. Long Island R. R. Co. 2 Lans. (N. Y.) 269 (1869). *Contra*, Anderson v. Mobile & O. R. R. Co., 38 So. 661 (1905).

[2] Basnight v. Atlantic & N. C. R. R. Co., 111 N. C. 592, 16 S. E. 323 (1892).

[3] Yoakum v. Dryden (Tex. Civ. App.), 26 S. W. 312 (1894).

[4] Ball v. New Jersey Sb. Co., 1 Daly, 491 (1865).

[5] Maloney v. Bacon, 33 Mo. App. 501 (1888).

[6] Becker v. Haynes, 29 Fed. 441 (1887).

**§ 731. When acceptance takes place.**

It sometimes becomes important to determine at what moment goods delivered to the carrier by tackling or other mechanical device pass into the possession of the carrier. Where goods are taken out of the vehicle in which they are brought to the conveyance of the carrier, the tackling by which the transfer is effected usually belongs to, or at least is operated by the carrier; and in that case the carrier's responsibility begins as soon as the goods are attached to the tackling.[1] The determining fact in such cases is the control of the machinery.[2] Much will depend upon the manner in which they receive goods for transportation, the provision they make for raising heavy articles into their cars, and the active participation of the agent of the company in reference to the same.[3] Where grain or liquid is shipped in bulk, it is usually delivered through a pipe or chute; and it may be important to determine the moment during delivery when the liability of the carrier begins. The cases hold (following the doctrine laid down in the case of delivery by a crane) that when the carrier, has control of the mouth of the pipe, he is responsible for the grain spilled.[4] But it would seem that the same result might be reached on a more general ground. As soon as goods are allowed to fall freely into a receptacle provided by the carrier, like coal passing from the mouth of a chute or, in this case, the grain falling past the cut-off at the top of the pipe, the shipper has completely lost control and the carrier, it would seem, has accepted possession. At that moment then the bailment and the carrier's liability begins.

[1] See The Cordillera, 5 Blatch. 518 (1867).

[2] Thomas v. Day, 4 Esp. 262 (1803). See also Street v. Morrison, 5 Allen (New Bruns.), 296 (1862).

[3] Dewey, J., in Merritt v. Old Colony & N. Ry. Co., 11 Allen (Mass.), 80, 83 (1865).

[4] The R. G. Winslow, 4 Biss. 13, Fed. Cas. No. 11,736 (1860).

**§ 732. Where acceptance takes place.**

If the carrier consents to send for a parcel at the house of the shipper, it would seem to be clear that he becomes liable at the shipper's house, where his servant accepts the parcel.[1] So if an express company by its agent receives goods as they arrive at the freight station of a railroad, the express company is liable from that time, though it has not yet brought the goods to its office.[2] Upon the same principle, where a carrier by sea, in a harbor where a vessel cannot reach the wharf to take its cargo, is accustomed to send lighters to the wharf to receive the cargo and bring it to the vessel, the carrier's liability begins as soon as the goods are received on board the lighter.[3] In one recent case a train master was held to have authority to accept freight when deposited beside the track far from the nearest station.[4] And in another case where a railroad at a certain station was accustomed to issue bills of lading for cotton delivered at a compress, it was held that the railroad was thereafter responsible for the cotton.[5]

**§ 733. Consent to delivery implied.**

The consent of the carrier to receive goods when placed in a certain place may be established by evidence of a special custom to that effect. In such a case the extent of the carrier's responsibility would be determined by the nature of the custom. If a custom can be shown for the carrier to be in charge and undertake responsibility for the goods from the moment of deposit, then he will undergo

[1] Davey v. Mason, Car & M. 45 (1841). But see Boys v. Pink, 8 C. & P. 361 (1838).

[2] Southern Exp. Co. v. Newby, 36 Ga. 635 (1867).

[3] Bulkley v. Naumkeag S. C. Co., 24 How. (U. S.) 386 (1860); The Bark Edwin, 1 Spra. 477 (1859); The Oregon, Deady, 179 (1866); The City of Alexandria, 28 Fed. 202 (1886); Campbell v. The Bark Sunlight, 2 Hughes, 9 (1877).

[4] Georgia S. & F. R. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961 (1904).

[5] Arthur v. Texas & P. Ry. Co.,

the legal liability of carrier from the moment of deposit in accordance with the custom,[1] even though he has no notice of the deposit.[2] But if the giving of notice is part of the custom, notice must be shown in the particular case.[3] This problem often arises in the case of a union station, where goods arriving by one carrier are to be delivered by it to a second carrier for further carriage.[4] Under these circumstances it is frequently the custom for the first carrier to deposit the goods in a part of the station appropriated to the second carrier, and for the latter then to be in charge of the goods without notice. In such a case the liability of the second carrier begins at the moment of deposit, even though the deposit is made at night or some other time when the second carrier has in fact no servants at hand to receive and care for the goods thus deposited. Where such a custom is proved to place goods in a freight car on a siding, the carrier is responsible as such from the

204 U. S. 505, 51 L. ed. 590, 27 Sup. Ct. 338 (1907).

[1] *Alabama.*—Montgomery & E. Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54 (1882).

*Connecticut.*—Merriam v. Hartford & N. H. R. R. Co., 20 Conn. 354, 52 Am. Dec. 344 (1850).

*Indiana.*—Evansville & T. H. R. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296 (1893).

*Iowa.*—Green v. Milwaukee & S. P. R. R. Co., 38 Ia. 100 (1874).

[2] It has indeed been asserted by the Supreme Court of New York, that a delivery in accordance with any custom must always be accompanied by notice to some authorized agent of the company; but this undoubtedly goes too far. Packard v. Getman, 6 Cow. (N. Y.) 757 (1827).

[3] See particularly:

*Connecticut.*—Trowbridge v. Chapin, 23 Conn. 595 (1855).

*Michigan.*—Wright v. Caldwell, 3 Mich. 51 (1853).

[4] The cases put in the text as to transfer in a union station in successive carriage are based upon the following authorities:

*Alabama.*—Montgomery & E. Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54 (1882).

*Arkansas.*—Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419 (1895).

*Connecticut.*—Converse v. Norwich & N. Y. Transp. Co., 33 Conn. 166 (1865).

*Illinois.*—Illinois Central R. R. Co. v. Smyser, 38 Ill. 354, 87 Am. Dec. 301 (1865).

*Indiana.*—Evansville & T. H. R.

moment the car is loaded and ready for the carrier to take it, and if the custom is to take charge of goods deposited beside the track ready for shipment, the carrier's responsibility begins from the moment of such deposit.

**§ 734. Customary acceptance of goods.**

Where the carrier consents to receive goods when they have been placed in a certain spot, he may become responsible for goods as soon as they are placed there, without further act of acceptance by any person acting for him. Where a railroad company made an express agreement to accept freight when placed beside its track at a point between stations, it was held that its responsibility as carrier began as soon as the goods were deposited in accordance with the agreement.[1] And so where a railway company furnished an intending shipper, at his request, with a car and left it upon a switch where it was loaded, and thereupon the agent of the carrier was notified thereof and he in turn had telegraphed to the train master, it was held that the car must be deemed delivered to the carrier for the purpose of shipment, though no bill of lading had been issued therefor, it being the custom of the carrier to move freight in advance of the issuing of such bill.[2] But it was held in another case [3] that the mere loading of cotton by a shipper on a car set out at a siding as was customary at a point where the carrier had no station or agent, neither it nor its agent having any knowledge that the car was loaded for shipment, was not

R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296 (1893).

*Kentucky.*—Newport News & N. V. R. R. Co. v. Mendell, 17 Ky. Law Rep. 1400, 34 S. W. 1081 (1896).

[1] Georgia S. & F. R. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961 (1904).

[2] Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. 419, 46 Am. St. Rep. 202 (1895).

[3] Tate v. Yazoo R. R. Co., 78 Miss. 842, 29 So. 392, 84 Am. St. Rep. 649 (1901).

such a delivery to the carrier as to make it liable as a common carrier for its loss by fire before the arrival of the train which in the regular course of business would have transported it to its destination. The carrier will therefore not be liable under the custom, without express assent and assumption of actual possession, unless the custom is strictly followed out by depositing the goods in the customary and reasonable place. Thus where a cutter [1] was placed upon the platform of a freight station and the proper agent notified, but it was carelessly placed so that it projected over the tracks and was struck and injured by a passing train, the court held that the delivery was not as perfect and complete as it should have been, and that the carrier had never come into possession of the cutter.

**§ 735. Acceptance of passengers at stations.**

It must be obvious that the relation of carrier and passenger may arise before actual transportation has begun. Thus, if a person who intends to be carried is on board a vehicle which is ready to start he has become a passenger, though the vehicle has not yet started.[2] So one who is on a steamboat at a wharf, ready to start, is a passenger, though the boat has not yet started.[3] One who is in the waiting room of a station, waiting to take the carrier's car, has been held to be a passenger.[4] But the question involved is merely the right of such person to safe premises, or to proper treatment by the carrier's servants,

[1] Grosvenor v. New York Central R. R. Co., 39 N. Y. 34 (1868).

[2] Massiter v. Cooper, 4 Esp. 260 (1803).

[3] *United States.*—Hrebrik v. Carr, 29 Fed. Rep. 298 (1886).

*New York.*—Dougherty v. N. Y. Cent. & H. R. R. R. Co., 86 N. Y. Supp. 746 (1904).

[4] *Indiana.*—Pere Marquette R. R. Co. v. Strange, 171 Ind. 160, 84 N. E. 819, 20 L. R. A. (N. S.) 1041 (1908).

*New York.*—Gordon v. Grand St. & N. R. R. Co., 40 Barb. (N. Y.) 546 (1863).

*Virginia.*—Norfolk & W. R. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935 (1893).

and this right would exist independently of the relation of carrier and passenger. It is better, therefore, to speak [1] of the obligation which the carrier owes "to one intending to become a passenger" in one of its trains, who would have a right to use the waiting room for a reasonable time before the arrival of the expected train.[2] The essential elements are summarized thus in a recent case—"a person intending to become a passenger must go to the station at a reasonable time before the time fixed for the departure of the train upon which he intends to take passage, in a proper manner, and there, either by the purchase of a ticket or in some other manner, indicate to the carrier his intention to take passage and thus place himself in the carrier's charge." [3]

**§ 736. Boarding a moving vehicle.**

It was early held that when a man, intending to take passage in a vehicle which has stopped to receive him, puts his foot upon the step or his hand upon a hand rail, he has been accepted as a passenger, and the responsibility of the carrier toward him as a passenger begins. The leading case is the English case of Brien v. Bennett.[4] An omnibus had stopped for a passenger, and just as the passenger put his foot on the step the omnibus started, throwing the passenger to the ground; the carrier was

[1] Devens, J., in Heinlien v. Boston & P. R. R. Co., 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676 (1888).

[2] See also among many other cases:

*Georgia.*—Central R. R. & B. Co. v. Perry, 58 Ga. 461 (1877).

*Kentucky.*—Louisville & N. R. R. Co. v. Reynolds, 71 S. W. 516, 24 Ky. Law Rep. 1402 (1903).

*Missouri.*—Albin v. Chicago, R. I. & P. Ry. Co., 103 Mo. App. 308, 77 S. W. 153 (1903).

*New York.*—Poucher v. New York Central R. R. Co., 49 N. Y. 263, 10 Am. Rep. 364 (1872).

*Texas.*—Texas & P. Ry. Co. v. Jones (Tex. Civ. App.), 39 S. W. 124 (1897).

[3] Fremont, E. & M. V. R. R. Co. v. Hagblad, 72 Neb. 773, 101 N. W. 1033, 4 L. R. A. (N. S.) 254, and cases cited (1904).

[4] 8 C. & P. 724 (1839).

held liable. What Lord Abinger then said has been universally followed.[1] "I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger." In accordance with this reasoning it has been held in most cases [2] that the relation of carrier and passenger is established the moment the vehicle begins to slacken its speed in response to the passenger's signal.[3] Where the invitation is express, there is no doubt of this. So where a train which was going slowly was flagged by an intending passenger, and the conductor told him to jump on, he became a passenger at once.[4] On the other hand if a person gets on a moving train after it has started, he is "outside of any implied invitation" on the part of the carrier, and does not at once acquire the rights of a

[1] See among the many cases on this point:

*Maryland.*—Central Ry. Co. v. Smith, 74 Md. 212, 21 Atl. 706 (1891).

*Massachusetts.*—Gordon v. West End St. Ry., 175 Mass. 181, 55 N. E. 990 (1900); Davey v. Greenfield & T. F. St. Ry. Co., 177 Mass. 106, 58 N. E. 172 (1900).

*Minnesota.*—Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550 (1884).

[2] *California.*—Finkeldey v. Omnibus Cable Co., 114 Cal. 28, 45 Pac. 996 (1896) "the slackening of the speed in response to his signal was an invitation from the driver for him to board the car."

*Georgia.*—White v. Atlanta St. Ry. Co., 92 Ga. 494, 17 S. E. 672 (1893).

*Illinois.*—North Chicago St. R. R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672 (1892) "it was a fair question for the jury whether, under all the circumstances, the plaintiff was not invited to get on the car. If he was so invited, he was a passenger."

*New York.*—Butler v. Glens Falls, S. H. & F. E. S. R. R. Co., 121 N. Y. 112, 24 N. E. 187 (1890).

*Texas.*—Lewis v. Houston Elec. Co. (Tex. Civ. App.), 88 S. W. 489 (1905).

[3] In some jurisdictions, however, it is held that though the car stops in response to a signal, the person for whom it stops does not become a passenger until he reaches the vehicle.

*Connecticut.*—Donovan v. Hartford St. Ry. Co., 65 Conn. 201, 32 Atl. 350, 29 L. R. A. 297.

*Massachusetts.*—Duchemin v. Boston E. Ry. Co., 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980 1904).

[4] Kansas & G. S. L. Ry. Co. v. Dorough, 72 Tex. 108, 10 S. W. 711 (1888).

passenger.[1] In the case just cited, it is held that even his reaching the platform of the car safely does not give him those rights. "If he had reached a place of safety and seated himself inside of the car, the bailment of his person to the defendant would have been accomplished, so that he would not have been prevented from asserting such rights because of his improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him in the threshold, and had put himself in the proper place for the carriage of passengers." There are variations among the authorities on this point, but this may go as a composite statement of the law.[2]

**§ 737. Carriage of goods secured by fraud.**

When the carriage of goods is secured by some fraud upon the carrier practiced by the shipper, the carrier does not occupy the position of a common carrier with regard to the goods. Thus, when one shipped a bag of money concealed in a bundle of hay and the money was lost, the carrier was held to be not responsible for the loss.[3] And in similar cases a carrier has been held not responsible for money hidden in package of tea,[4] or in boxes with household goods.[5] Upon like principles it has often been held that if the goods are tendered in such a shape as to inevi-

[1] Merrill v. Eastern R. R. Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705 (1885).

[2] See also:

*United States.*—Pennsylvania R. R. Co. v. Reed, 60 Fed. 694 (1894).

*Illinois.*—Illinois Central R. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68 (1897).

*Massachusetts.*—Lockwood v. Boston Elevated Ry. Co., 200 Mass. 537, 86 N. E. 934 (1908).

*Mississippi.*—Georgia Pac. Ry. Co. v. Robinson, 68 Miss. 643, 10 So. 60 (1891).

*Pennsylvania.*—Sharrer v. Paxson, 171 Pa. 26, 33 Atl. 120 (1895).

[3] Gibbon v. Paynton, 4 Burr. 2298 (1769).

[4] Bradley v. Waterhouse, 3 C. & P. 318 (1828).

[5] Chicago & A. R. R. Co. v. Thompson, 19 Ill. 578 (1858).

tably mislead the carrier in judging their character, then there is not such acceptance as gives rise to the obligation which a common carrier owes a shipper. Thus, when goods of great value were sent in an ordinary package without declaring their nature, the carrier was not held liable for their value in case of loss.[1] And the same decision was reached where a box containing a diamond was given a mean appearance by the shipper.[2] So, where valuable laces and jewels were packed in ordinary dry goods boxes to look like merchandise the principle was held to apply.[3] And this was even held to extend to a case where valuable clothing was hidden in bedding.[4] On the other hand if there is no apparent design to tender the goods in false dress, the obligation seems to be upon the carrier to inquire the value of the goods,[5] or their character.[6] But this principle obviously has no application to a case where a box containing jewels was marked "glass," [7] or where a very large sum of money was sent under circumstances indicating very little value.[8]

**§ 738. Stealing a ride.**

One who steals a ride upon a vehicle of the carrier, that is, conceals himself, intending to evade fare, is not to be regarded as a passenger.[9] And the same thing is true where a person gets on board the carrier's vehicle, refuses either

[1] Batson v. Donovan, 4 B. & Ald. 21 (1820).

[2] Southern Exp. Co. v. Everett, 37 Ga. 688 (1868).

[3] Warner v. Western Transp. Co., 5 Robt. (N. Y. Sup. Ct.) 490 (1868).

[4] Chicago & A. R. R. Co. v. Shea, 66 Ill. 471 (1873).

[5] Phillips v. Earle, 8 Pick. (Mass.) 182 (1829).

[6] Merchants' Desp. Co. v. Bolles, 80 Ill. 473 (1875).

[7] Relf v. Rapp, 3 W. & S. (Pa.) 21, 37 Am. Dec. 528 (1841).

[8] Oppenheimer v. United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596 (1873).

[9] *Georgia.*—Wynn v. City & Suburban Ry. Co. of Savannah, 91 Ga. 344, 17 S. E. 649 (1893).

*Illinois.*—Chicago, B. & Q. R. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17 (1889).

*Indiana.*—Chicago & E. Ry. Co.

to pay fare or to leave the vehicle, and succeeds in staying on the vehicle by force. In a case of this sort a person entered a stagecoach with a revolver and compelled the driver to allow him to ride without payment of fare. The coach broke down, and he was injured and sued for damages; but it was held that he was not a passenger and could not recover damages.[1] So where a person is riding on a train, having used or intended to use a ticket which he knows he has no right to use, and concealing or intending to conceal that fact from the conductor, he is not to be regarded as a passenger, even if the conductor permits him to ride.[2] The consent of the conductor to accept the ticket is not material if the consent was obtained by fraud; though probably if knowing the facts the conductor allowed the substitution, the person so allowed to ride would be a passenger; [3] and clearly, if the carrier habitually permitted such substitution, in spite of the exact terms of the ticket, the person using it in accordance with the custom would be a passenger.[4] It sometimes happens that a person enters a carrier's vehicle prepared to pay fare if it

v. Field, 7 Ind. App. 172, 34 N. E. 406 (1893).

*Maryland.*—State v. Baltimore & O. R. R. Co., 24 Md. 84 (1865).

*Massachusetts.*—Planz v. Boston & A. R. R. Co., 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835 (1892).

*Missouri.*—Muehlhausen v. St. Louis R. R. Co., 91 Mo. 332, 2 S. W. 315 (1886).

*New York.*—Barry v. Union Ry. Co., 105 N. Y. App. Div. 520, 94 N. Y. Supp. 449 (1905).

[1] Higley v. Gilmer, 3 Mont. 90.

[2] *Illinois.*—Toledo W. & W. Ry. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613 (1887), nontransferable free pass issued to another.

*Iowa.*—Way v. Chicago, R. I. & P. Ry. Co., 64 Ia. 48, 19 N. W. 828, 52 Am. Rep. 431 (1884), nontransferable mileage book issued to another.

*Kansas.*—Union Pac. Ry. Co. v. Nichols, 8 Kan., 505, 12 Am. Rep. 475 (1871), fraudulent impersonation of express messenger.

*Massachusetts.*—Fitzmaurice v. New York, N. H. & H. R. R. Co., 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146 (1906), students' ticket obtained by fraud.

[3] Way v. Chicago, R. I. & P. Ry. Co., supra.

[4] Great Northern Ry. Co. v. Harrison, 10 Exch. Rep. 376 (1854).

is demanded, but hoping to escape the notice of the conductor and so avoid paying fare. It is hard to see how this form of fraud differs from any other, and the better view would seem to be that such a person is not a passenger until by paying his fare he is received as such by express consent of the conductor.[1] On the other hand one who takes a train intending to pay his fare with a ticket which he *bona fide* believes to be a good one is a passenger, though in fact the ticket is not good for a passage in that train; and he is to be regarded as a passenger [2] until he learns his mistake and has a chance to leave the train, or decides to stay on the train and pay his fare.

*Topic C. Whether Acceptance is Authorized*

**§ 739. Who is the real proprietor.**

Questions often arise as to by whom the undertaking is professed. The service may actually be undertaken by one party, and yet another be the party ultimately responsible whom it is wished to reach. Thus it is often of first importance to determine which one of several parties engaged in the service in question is the real principal. That question as we shall then see is often difficult of solution by reason of the confusion in the facts; but the legal problem is simply that of determining which party it is who has undertaken the service of the public. Even the ostensible manager is not the true proprietor of the public

[1] See Gardner v. New Haven & N. Co., 51 Conn. 143, 50 Am. Rep. 12 (1883), and note; Ramm v. Minneapolis & St. P. Ry. Co., 94 Ia. 296, 62 N. W. 751 (1895). But see Doran v. East River Ferry Co., 3 Lans. (N. Y.) 105 (1870).

[2] *Indiana.*—Cincinnati, H. & I. R. R. Co. v. Carper, 112 Ind. 26, 14 N. E. 352 (1887), traveler on freight train.

*Missouri.*—Short v. St. Louis & S. F. Ry. Co. (Mo. App.), 130 S. W. 488 (1910).

*Pennsylvania.*—Arnold v. Pennsylvania R. R. Co., 115 Pa. 135, 8 Atl. 213, 2 Am. St. Rep. 542 (1887), passenger on freight train.

*West Virginia.*—Boggess v. Chesapeake & O. Ry. Co., 37 W. Va. 297, 16 S. E. 525, 23 L. R. A. 777, limited ticket had expired (1892).

enterprise. Thus the salaried manager of a hotel belonging to a corporation is not to be held responsible as an innkeeper; the real owner of the enterprise, the person in actual charge of it cannot escape responsibility by taking out a license to conduct an inn in the name of another, or by placing another's name on the sign or the advertisements as the ostensible innkeeper. In spite of such devices, the person who actually conducts the inn will be held as the innkeeper.[1] However, it must be shown that the party sought to be charged is in truth the proprietor of the enterprise. Thus it was held in an early case that the owners of a ferry were not liable for the defaults of their lessee who operated it.[2]

**§ 740. Situation after railroad leases.**

Thus, generally speaking, it is the one who is conducting the service who assumes the duties with respect to its facilities to the public. This proprietor is not necessarily the owner of the facilities used; indeed very frequently the plant is leased by the party that is operating it. The chief example of this is to be found in the history of railroads in this country which has been one of constant combination of the existing roads into longer lines. This is sometimes accomplished by a consolidation of two railway corporations into one. But it is frequently done by leasing one railroad to another, the latter road then operating both. Where this is the case, it must be clear that the operating road is the carrier, and cannot escape liability as such. It is in fact carrying on the business of carriage over the whole line.[3] On the other hand, the

[1] Davis v. Button, 78 Cal. 247, 18 Pac. 133, 20 Pac. 545 (1889).

[2] Ladd v. Cholard, Minor (Ala.), 366.

[3] See among other cases illustrating the general principle:

*United States.*—Illinois Central R. R. Co. v. Sheegog, 215 U. S. 308, 30 L. ed. 101 (1909).

*Alabama.*—South Western R. R. Co. v. Webb, 48 Ala. 585 (1872).

*Arkansas.*—Eureka Springs Ry.

leasing corporation has evidently gone out of the business of carrying and can no longer be held to be a carrier, though it may as a corporation, continue liable for the reception and safe carriage of persons or goods because of some provision in its charter.[1]

**§ 741. Dealings with unauthorized persons.**

One who has dealings with an unauthorized person cannot charge his alleged principal. Thus one who delivers goods to a person purporting to act for a carrier must see to it that the person is actually authorized by the carrier to accept goods on his behalf; the shipper takes the risk of the authority of the person with whom he chooses to deal.[2] In accordance with this test it is not, or may not be, enough to charge the carrier by coach to show that the goods were handed to the driver [3] to charge an express company to show that the goods were handed to a man in its uniform, or to charge a carrier by water,[4] to show that the goods were handed to a person standing on the wharf,[5] or to a deck hand or other member of the crew.[6]

Co. v. Timmons, 51 Ark. 459, 11 S. W. 690 (1888).

*Illinois.*—People ex rel. v. St. Louis, A. & T. H. R. R. Co., 176 Ill. 512, 52 N. E. 292 (1898).

*Massachusetts.*—McCluer v. Manchester & L. R. R. Co., 13 Gray, 124, 74 Am. Dec. 624 (1859).

*Michigan.*—Patterson v. Wabash, St. L. & P. Ry. Co., 54 Mich. 91, 19 N. W. 761 (1884).

*New York.*—Reidman v. Brooklyn, Q. C. & S. Ry. Co., 51 N. Y. Supp. 196, 28 App. Div. 540 (1898).

*North Carolina.*—Dunn v. Asheville & C. M. Ry. Co., 141 N. C. 521, 54 S. E. 416 (1906).

*Texas.*—International & G. N. Ry. Co. v. Thorton, 3 Tex. Civ. App. 197, 22 S. W. 67 (1893).

*Virginia.*—Winchester & S. R. R. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692 (1906).

[1] Langley v. Boston & Maine R. R. Co., 10 Gray (Mass.), 103 (1859).

[2] Elkins v. Boston & Maine R. R. Co., 23 N. H. 275 (1851).

[3] Blanchard v. Isaacs, 3 Barb. (N. Y.) 388 (1848).

[4] Abrams v. Platt, 23 N. Y. Misc. 637, 52 N. Y. Supp. 153 (1898).

[5] Buckman v. Levi, 3 Camp. 414 (1813).

[6] Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716 (1873).

It is, however, sufficient to deliver the goods to a servant of the carrier who is usually employed in receiving and forwarding goods for the carrier; for a shipper has a right to assume that such a person has ample authority to deal with him in this matter.[1]

**§ 742. For whom a servant acts.**

The possibility is to be considered that the servant of the proprietor may be acting as the servant of the patron in doing the act in question. This is often, as will be seen, a close question of fact. The issue is perhaps best brought out in certain of the telegraph cases. It would seem to be clear that a telegraph operator in writing a message down for the sender acts almost invariably as his amanuensis. And so the majority of the cases hold [2] although there is some dissent.[3] But it is a doubtful question whether a telegraph boy bringing a message to a telegraph office is acting for the sender,[4] or for the company.[5] The doubt is whether it is the company that the messenger is acting for, or whether the sender consciously adopts the servant

[1] The City of Alexandria, 28 Fed. 202 (1886).

[2] The company was held not liable in:

*North Carolina.*—Pegram v. W. U. Tel. Co., 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557 (1888).

*Texas.*—Western Union Tel. Co. v. Edsall, 63 Tex. 668 (1885); Western Union Tel. Co. v. Foster, 64 Tex. 220. 53 Am. Rep. 754 (1885); Gulf, Colorado & S. F. Ry. Co. v. Geer, 5 Tex. Civ. App. 349, 24 S. W. 86 (1893).

[3] The company was held liable in:

*Indiana.*—Western Union Tel. Co. v. Sanders, 39 Ind. App. 146, 79 N. E. 406 (1906).

*Pennsylvania.* — Western Union Tel. Co. v. Stevenson, 128 Pa. St. 442, 18 Atl. 441, 15 Am. St. Rep. 687, 5 L. R. A. 515 (1889).

[4] The company was held not liable in Stamey v. Western Union Tel. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95 (1894).

[5] The company was held liable in Will v. Postal Tel. Cable Co., 3 App. Div. 22, 37 N. Y. Supp. 933 (1896).

On the other hand the agent of another may be held out as one's own. Thus a telegraph operator permitted to act for the railway as a ticket agent subjects the railroad company to liabilities. Rohrig v. Chicago. R. I. & P. Ry. Co., 130 Ia. 380, 106 N. W. 935 (1906).

as his own, being apprised that the company never send for messages except as a favor in particular cases.

**§ 743. Independent service by servant.**

Where the customer is dealing with an employé it is sometimes difficult to say whether the servant is undertaking public service on behalf of his master or whether he is agreeing to a private service in his personal capacity. Thus in one set of early cases the question was repeatedly raised as to the liability of the proprietor of a conveyance where a parcel is given to the servant of a carrier under such circumstances that it seems doubtful whether the servant or the master becomes the bailee and carrier. It is quite possible for the servant of a carrier to take and carry goods independently of his master, and when this is alleged to be the case all the circumstances must be examined to determine the question. If the shipper is aware that the carriage is a private matter, for the private gain of the servant, he cannot hold the master liable; and so if he delivers to the servant to be carried gratuitously, as a matter of friendship, since such an arrangement is not a business arrangement and could hardly be supposed by the shipper to be made on the master's account.[1] The mere fact that by an arrangement between the carrier and his servant the latter was to receive the compensation would not absolve the carrier from liability

[1] In the following cases collected from many others this issue is well discussed:

*United States.*—Suarez v. The Washington, 1 Woods, 96 (1871), Fed. Cas. No. 13,585 (1870); Citizens' Bk. v. Nantucket Sb. Co., 2 Story, 16 (1841).

*Louisiana.*—Mechanics' & T. Bank v. Gordon, 5 La. Ann. 604 (1850).

*Missouri.*—Choteau v. The St. Anthony, 16 Mo. 216 (1852).

*Pennsylvania.*—Sneider v. Geiss, 1 Yeates (Pa.), 34 (1791).

*England.*—Butler v. Basing, 2 C. & P. 613 (1827).

Similarly in King v. Lenox, 19 Johns. 235 (1821), commissions intrusted to the captain within his "master's privilege" were held not chargeable to the owners.

if he had permitted it to be understood that he authorized the transaction.[1]

**§ 744. Private arrangement with employé.**

To cite still other instances, baggage given over to the porter of a hotel will either be a bailment to the innkeeper or a private arrangement with the porter as the understanding may be.[2] When the customer is aware that the service is outside the scope of the employment or apprised that the service is a private matter for the private gain of the employé himself, he cannot then hold the proprietor liable. It may be added that such dealings with the servant are obviously upon a private basis in such cases, for it would almost never appear that the servant was undertaking such accidental services with publicity and regularity for fixed charges and without discrimination.[3]

**§ 745. Guests invited by servants.**

One who is received as a guest upon the invitation of the servant of the proprietor certainly should understand that he does not fall within the profession of that master. Thus one who is riding in the carrier's vehicle, not as ordinary passengers ride, but upon invitation of the carrier's serv-

[1] *Alabama.*—Knox v. Rives, 14 Ala. 249, 48 Am. Dec. 97 (1848).

*Massachusetts.*—Dwight v. Brewster, 1 Pick. 50, 11 Am. Dec. 133 (1822).

*Mississippi.*—Powell v. Mills, 30 Miss. 231 (1855).

*New Hampshire.*—Bean v. Sturtevant, 8 N. H. 146, 28 Am. Dec. 389 (1835).

*Pennsylvania.* — Beckman v. Shouse, 5 Rawle, 179 (1835).

*Vermont.*—Farmers' & Mechanics' Bank v. Champlain T. Co., 23 Vt. 186, 56 Am. Dec. 68 (1851).

[2] Acceptance obviously on private basis:

*Pennsylvania.*—Houser v. Tully, 62. Pa. 92, 1 Am. Rep. 390 (1869).

*Tennessee.*—Tulane Hotel v. Holohan, 112 Tenn. 214, 79 S. W. 113 (1903).

Acceptance apparently on public basis:

*Georgia.*—Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 20 Am. St. Rep. 333, 6 L. E. A. 483 (1889).

*Pennsylvania.*—Sneider v. Geiss, 1 Yeates (Pa.), 34 (1791).

[3] Shelden v. Robinson, 7 N. H. 157, 26 Am. Dec. 726 (1834).

ant, without paying fare, is not a passenger; his relation is with the servant, not with the carrier.[1] Thus, where a yard master out of hours took an engine and car without permission of the defendant company, and invited persons to ride free in the car to a meeting, over a portion of the road not used for passenger trains, he was held not to have even apparent authority to act for the company, and the persons so riding were not passengers.[2] And where a party of children were invited by a servant of the carrier to ride on a train which was being shifted through the yard, they were not passengers.[3] However far the ap-

[1] *United States.*—Waterbury v. New York Central & H. R. R. R. Co., 17 Fed. Rep. 671 (1883), riding on engine by consent of engineer; Clark v. Colorado & N. W. Ry. Co., 165 Fed. 408, 91 C. C. A. 358, 19 L. R. A. (N. S.) 988 (1908), riding in cab by invitation of engineer.

*Colorado.*—Atchison, T. & S. F. R. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822 (1893), conductor induced to let plaintiff ride free on freight train.

*Illinois.*—Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245 (1876), conductor induced to let plaintiff ride free on passenger train; Chicago & A. R. R. Co. v. Michie, 83 Ill. 427 (1876), riding on engine by consent of engineer.

*Minnesota.*—McVeety v. St. Paul, M. & M. Ry. Co., 45 Minn. 268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728 (1891), riding free on freight train.

*Missouri.*—Youmans v. Wabash Ry. Co. (Mo. App.), 127 S. W. 959 (1910), conductor induced to let plaintiff ride free on freight train.

*Nebraska.*—Woolsey v. Chicago, B. & Q. R. R. Co., 39 Neb. 798, 58 N. W. 444, 25 L. R. A. 79 (1894), riding on engine by consent of fireman, to shovel coal.

*New York.*—Robertson v. New York & E. R. R. Co., 22 Barb. (N. Y.) 91 (1856), riding on engine by consent of engineer.

[2] Chicago, St. P., M. & O. Ry. Co. v. Bryant, 65 Fed. Rep. 969 (1895).

[3] Reary v. Louisville, N. O. & T. Ry. Co., 40 La. Ann, 32, 3 So. 390, 8 Am. St. Rep. 497 (1888).

In a few cases, however, it has been held that children riding on a vehicle by invitation of a servant of the company are entitled to be regarded as passengers. Thus, where the driver of a street car invited children to ride on the front platform, they were held to be passengers. Wilton v. Middlesex R. R. Co., 107 Mass. 108, 9 Am. Rep. 11 (1871); Muehlhausen v. St. Louis R. R. Co., 91 Mo. 332, 2 S. W. 315 (1886); Buck v. People's St. Ry. & E. L. & P. Co., 108 Mo. 185, 18 S. W. 1090 (1892). And where a conductor invited a boy to ride in a

parent authority of a conductor may be held to extend, it cannot cover an invitation to ride free; free carriage is not the carrier's business.[1] If one riding free by invitation of a servant is not a passenger, *a fortiori* one who by misrepresentation induces the servant to let him ride free is not a passenger, and still more clearly one who bribes the servant by a small fee to let him ride without paying the regular fare is not a passenger.[2]

**§ 746. Service obtained by connivance.**

One who is on the carrier's vehicle not by any arrangement with the carrier, but by the connivance of the conductor, for the purpose of selling newspapers or other articles to the passengers, is not in any sense a passenger, and is entitled to little more care than a trespasser.[3] A newsboy jumping on and off a moving street car to sell his newspapers without being stopped by the conductor is not a passenger.[4] So where a person on a train induces the conductor out of charity,[5] or by misrepresentation, to

freight train (on which passengers were sometimes carried) the boy was held to be a passenger. St. Joseph & W. R. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461 (1886); Sherman v. Hannibal & S. J. R. R. Co., 72 Mo. 62, 37 Am. Rep. 423 (1880); Whitehead v. St. Louis, I. M. & S. Ry. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409 (1889). But these cases can hardly be supported.

[1] *United States.*—Condran v. Chicago, M. & St. P. Ry. Co., 67 Fed. 522 (1895).

*Colorado.*—Atchison, T. & S. F. R. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822 (1893).

[2] *Minnesota.*—McNamara v. Gt. Northern Ry. Co., 61 Minn. 296, 63 N. W. 726 (1895); Brevig v. Chicago. St. P., M. & O. Ry. Co., 64 Minn. 168, 66 N. W. 401 (1896).

*Texas.*—Rucker v. Missouri Pac. Ry. Co., 61 Tex. 499 (1884).

Upon similar principles a traveler refused by an innkeeper because the inn was full, who was taken in by a guest was held not to be a guest himself. Bird v. Bird, Anderson, 29.

[3] *Connecticut.*—Griswold v. New York & N. E. R. R. Co., 53 Conn. 371, 55 Am. Rep. 115 (1885).

*Missouri.*—Padgitt v. Moll. & Citizens' Ry. Co., 159 Mo. 143, 60 S. W. 121 (1900).

[4] Barry v. Union Ry. Co., 105 App. Div. 520, 94 N. Y. Supp. 449 (1905).

[5] Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245 (1876).

allow him to ride free, such a person is not a passenger. "It is manifest that if a person were stealthily, and wholly without the knowledge of any of the employés of the company, to get upon a train and secrete himself, for the purpose of passing from one place to another, he could not recover if injured. In such a case his wrongful act would bar him from all right to compensation. Then, does the act of the person who knowingly induces the conductor to violate a rule of the company, and prevails upon him to disregard his obligations to fidelity to his employer, to accomplish the same purpose, occupy a different position or is he entitled to any more rights? He thereby combines with the conductor to wrong and defraud his employer out of the amount of his fare, and for his own profit." [1]

### § 747. Bill of lading issued without goods.

Since a bailment is required before the carrier of goods becomes responsible as such, it must be clear that without such bailment one cannot be a carrier of goods. It sometimes happens that a bill of lading is issued by the servant of a carrier without a delivery to the carrier of the goods named in the bill. According to what is clearly the weight of authority the issue of a bill of lading by a servant under these circumstances does not make his master liable

One obtaining permission from the conductor to ride upon a freight train for less than the regular fare, who is shut into a freight car for the trip, has not the rights of a passenger. Grahn v. International & G. N. Ry. Co., 100 Tex. 27, 93 S. W. 104, 5 L. R. A. (N. S.) 1025 (1906).

[1] *United States.*—Condran v. Chicago, M. & St. P. Ry. Co., 67 Fed. 522, 14 C. C. A. 506, 32 U. S. App. 182, 28 L. R. A. 749 (1895).

*Colorado.*—Atchison, T. & S. F. R. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185, 20 L. R. A. 822 (1893).

*Kansas.*—Mendenhall v. Atchison, T. & S. F. Ry. Co., 66 Kan. 438, 71 Pac. 846, 61 L. R. A. 120 (1903).

*Pennsylvania.*—Duff v. Allegheny V. R. R. Co., 91 Pa. 458, 36 Am. Rep. 675 (1879).

in any way therefor, not even to a purchaser for value without notice.[1] In the leading case of Grant v. Norway [2] this is thus explained. "It is not contended that the captain had any real authority to sign bills of lading, unless the goods had been shipped. Nor can we discover any ground upon which a party taking a bill of lading by indorsement would be justified in assuming that he had any authority to sign such bills, whether the goods were on board or not."

### § 748. Jurisdictions holding carrier liable.

In other jurisdictions, however, it is held that if a bill of lading is issued by the proper agent of the carrier without receiving the goods and is indorsed for value by the taker to a *bona fide* purchaser, the carrier cannot as against him dispute the receipt of the goods.[3] There is much to

[1] *United States.*—Schooner Freeman v. Buckingham, 18 How. (U. S.) 182, 15 L. ed. 341 (1855); Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998 (1881); The Loon, 7 Blatch. 244, Fed. Cas. No. 8499 (1870); Clark v. Clyde S. S. Co., 148 Fed. 243 (1905).

*Louisiana.*—Fellows v. The Powell, 16 La. Ann. 316, 79 Am. Dec. 581 (1851).

*Maryland.*—Baltimore & O. R. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26 (1875).

*Massachusetts.*—Sears v. Wingate, 3 Allen, 103 (1861).

*Minnesota.*—National Bank of Commerce v. Chicago, B. & N. Ry. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566 (1890).

*Missouri.*—Louisiana Nat. Bank v. Lavielle, 52 Mo. 380 (1873).

*Mississippi.*—Hazard & C. v. Illinois Central R. R. Co., 67 Miss. 32, 7 So. 280 (1889).

*North Carolina.*—Williams v. Wilmington & W. R. R. Co., 93 N. C. 42 (1885).

*Ohio.*—Dean v. King, 22 Ohio St. 118 (1871).

*Washington.*—Roy & R. v. Northern Pacific Ry. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302 (1906).

[2] 10 C. B. 665 (1851).

[3] *Alabama.*—Jasper Trust Co. v. Kansas City, M. & B. R. R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75 (1892).

*Connecticut.*—Relyea v. New Haven R. M. Co., 42 Conn. 579 (1873).

*Kansas.*—Wichita Sav. Bank v. Atchison, T. & S. F. Ry. Co., 20 Kan. 519 (1878).

*Nebraska.*—Sioux City & P. Ry. Co. v. First Nat. Bank of F., 10

be said for this view both on general principle and as to its practical effect. Theoretically, to hold the carrier liable for such acts of his agent would be going no further than the law usually goes in holding a principal liable for acts of his agent within his apparent authority. Practically there is good ground for an estoppel, as the cases just cited urge. The carrier is not responsible as such on the real facts; but in this particular case the real facts cannot be shown against a purchaser for value without notice. At all events the bill should be conclusive against the carrier who himself signs the document; and so where a carrier issued two bills of lading for the same goods, and the two bills came into the hands of two holders for value and without notice, it was held that the carrier could not dispute the receipt of two lots of goods.[1]

Neb. 556, 7 N. W. 311, 35 Am. St. Rep. 488 (1880).

*New York.*—Armour v. Michigan Central Ry. Co., 65 N. Y. 111, 22 Am. Rep. 603 (1875).

*Pennsylvania.*—Brooke v. New York, L. E. & W. Ry. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235 (1885).

*Tennessee.*—Watson v. Memphis & T. Ry. Co., 9 Heisk. 255 (1872).

[1] Coventry v. Great Eastern Ry. Co., 11 Q. B. D. 776 (1883). Apparently there is no conflict of authority as to the liability of a carrier who himself makes the bills.

# PART VI. MANAGEMENT OF THE BUSINESS

## CHAPTER XXII

### BASIS OF THE UNDERTAKING

§ 750. Whether the transaction is public or private.

*Topic A. Service Rendered upon a Special Basis*

§ 751. Boarders at an inn.
752. Special acceptance as guest.
753. Chartered accommodations.
754. Special passenger trains.
755. Special freight trains.
756. Regular train established upon special guaranty.
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*Topic B. Unusual Methods of Service*

§ 759. Passengers traveling in an unusual place.
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*Topic C. Peculiar Conditions of Service*

§ 767. Owner accompanying his goods.
768. Carrier in general control.
769. Luggage carried by passengers.
770. Special arrangements with innkeepers.
771. Goods taken across a ferry.
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773. Switching cars.
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§ 775. Responsibility for through cars.
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*Topic D. Special Arrangements with Particular Classes*

§ 777. Mail clerks.
778. Express messengers.
779. Employés of car companies.
780. Owners accompanying their shipments.
781. Employés of contracting shippers.
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783. Employés while on duty.
784. Employés receiving independent service.
785. Full liability in gratuitous service.
786. Explicit limitation to private basis.

## § 750. Whether the transaction is public or private.

It has been seen that unless there has been a public profession to perform the service in question there is no duty to undertake that service. But this is not all. Suppose that one engaged in a public employment makes a special arrangement with one whom he would have been obliged to serve—is this service upon a public or a private basis? Or suppose not being obliged to serve the particular applicant he actually receives him as though he were—is this service upon a public or a private basis? It is important to get from the cases discussed in this chapter a clear conception of the conclusive effect of the actual reception. If there has been actual acceptance in a particular case the question whether the acceptance was upon a public or a private basis is not settled by determining whether the service was obligatory or not; for whatever the presumption may be in a given case, this may be negatived by the proof as to the actual basis of the acceptance.[1] These distinctions are shown plainly in the two

[1] In the late case of Santa Fe, P. & P. Ry. Co. v. Grant Bros. Const. Co. (Ariz.), 108 Pac. 467 (1910), the traditional law on this point is thus elaborately stated: "The tests whether a carrier is a 'common carrier' are: First, he must be engaged in the business of carrying goods for others as a public employé, and so hold himself out; sec-

sections immediately following. In the first it is pointed out that, although obliged to receive a traveler as a guest, the innkeeper may, by special arrangement with him, receive him as a boarder. In the second, it is shown that although not obliged to receive a neighbor as a guest, an innkeeper may voluntarily receive him as such.

*Topic A. Service Rendered upon a Special Basis*

**§ 751. Boarders at an inn.**

An innkeeper may, and commonly does, entertain not merely transient guests, but other persons who stay at the inn for a considerable period, making in fact their residence there; such persons are boarders, not guests.[1] If a person is at an inn for entertainment, the question whether he is a guest or a boarder is a question of fact, the crucial point being whether he is taken as a traveler or whether a special arrangement is made with him.[2] The relation of innkeeper and guest once being established will be presumed to continue until the contrary appears, and not to be changed to the relation of host and boarder. The relation is not necessarily and conclusively changed

ond, he must undertake to carry goods of the kind to which his business is confined; third, he must undertake to carry by the methods by which his business is conducted and over his established roads; fourth, transportation must be for hire; and, fifth, an action must lie against him if he refused without reason to carry such goods for those willing to comply with his terms."

[1] *Connecticut.*—Walling v. Potter, 35 Conn. 183 (1868).

*Massachusetts.*—Hall v. Pike, 100 Mass. 495 (1868).

*New Mexico.*—Horner v. Harvey, 3 N. Mex. 197, 5 Pac. 329 (1885).

*Pennsylvania.*—Jeffords v. Crump, 12 Phila. (Pa.) 500 (1878).

*Utah.*—Lawrence v. Howard, 1 Utah, 142 (1874).

[2] *Arizona.*—Haff v. Adams, 6 Ariz. 395, 59 Pac. 111 (1899).

*California.*—Magee v. Pacific Improvement Co., 98 Cal. 678, 33 Pac. 772 (1893).

*Iowa.*—Pollock v. Landis, 36 Ia. 651 (1873).

*Massachusetts.*—Hall v. Pike, 100 Mass. 495 (1868).

*New York.*—Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112 (1883).

*New Brunswick.*—Light v. Abel, 6 Allen, 400 (1866).

by an agreement as to price, or any definite length of sojourn.[1] When one is staying at the inn under a contract by which he is to remain there a certain considerable time, and in return gets a special rate for board, he is presumably a boarder.[2] But the mere fact that he has stayed for a week or longer, and that he is paying the weekly rather than the daily rate, does not prove that he is a boarder.[3]

**§ 752. Special acceptance as guest.**

On the other hand a person not entitled to demand admittance, not being a *bona fide* traveler, will become a guest and entitled to all the rights of a guest if he is received voluntarily in the inn upon the footing of a guest. The innkeeper has a right to refuse to receive him, but that right he may waive; and he does waive it by consenting to receive the guest. Thus it is usually stated that one who lives in the same town with the innkeeper cannot be a guest, since he is not a traveler seeking entertainment during his journey. While it is true that such a person is often received to be entertained out of

[1] Ross v. Mellin, 36 Minn. 421, 32 N. W. 172 (1887).

[2] *Arizona.*—Haff v. Adams, 6 Ariz. 395, 59 Pac. 111 (1899).

*California.* — Moore v. Long Beach Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265 (1891).

*Iowa.*—Shoecraft v. Bailey, 25 Ia. 553 (1868).

*Kansas.*—Johnson v. Reynolds, 3 Kan. 257 (1865).

*New York.*—Smith v. Keyes, 2 Th. & C. (N. Y.) 650 (1874).

*Tennessee.*—Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859, 46 L. R. A. 319, 73 Am. St. Rep. 886 (1899).

*Australia.*—Ex parte M'Manus, 6 Austral. L. T. (Vict.) 12 (1884).

[3] *Alabama.*—Beale v. Posey, 72 Ala. 323 (1882).

*California.*—Fay v. Pacific Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 27 Am. St. Rep. 198, 16 L. R. A. 188 (1892).

*Iowa.*—Pollock v. Landis, 36 Ia. 651 (1873).

*Massachusetts.*—Berkshire Woolen Co. v. Proctor, 7 Cush. (Mass.) 417 (1851).

*Michigan.*—Polk & Co. v. Melenbacker, 136 Mich. 611, 99 N. W. 867 (1904).

*Minnesota.*—Ross v. Mellin, 36 Minn. 421, 32 N. W. 172 (1887).

friendship merely, and therefore is not a guest,[1] yet if he is really received on the footing of a guest the relation of host and guest is thereby established.[2]

**§ 753. Chartered accommodations.**

When the owner of a vehicle makes a lease of it to another party, who uses it for the carriage of goods, plainly the lessor is not the carrier. Thus, in Bell v. Pidgeon,[3] the owner of some scows, which he used in his business, leased them to others for the transportation of their chalk. It was held that the owner was in no sense a carrier, since he neither took possession nor furnished the motive power. And in the Daniel Burns,[4] it was held that a canal boat hired at a daily rate for use in storing grain about the harbor, subject wholly to the control of the hirer in respect to loading, unloading, navigation, and delivery of the cargo, was not carrying. In Campbell v. Perkins,[5] where the defendants owned a line of boats, and used them as common carriers of passengers and goods, and chartered one of them to another company for a single trip, but retained the charge of it, and of navigating it, it was held that they were liable to a passenger for the loss of his baggage. There are other cases of this type.[6]

**§ 754. Special passenger trains.**

A railroad may run a special train, not intended for

*New York.*—Metzger v. Schnabel, 23 N. Y. Misc. 698, 52 N. Y. Supp. 105 (1898).

*North Carolina.*—Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037, 14 L. R. A. 475 (1907).

*Wisconsin.*—Jalic v. Cardinal, 35 Wis. 118 (1874).

*Canada.*—Whiting v. Mills, 7 Upp. Can. Q. B. 450 (1849).

[1] Walling v. Potter, 35 Conn. 183 (1868).

[2] Orchard v. Bush (1898), 2 Q. R. 284, 67 L. J. Q. B. 650, 78 L. T. Rep. 557, 46 W. R. 527 (1898).

[3] 5 Fed. 634 (1882).

[4] 52 Fed. 159 (1892), aff'd 56 Fed. 605 (1893).

[5] 4 Selden (N. Y.), 430 (1853).

[6] Phelps v. Windsor Stb. Co., 131 N. C. 12, 42 S. E. 335 (1902).

passengers in general, in which therefore no one can claim to be carried as a passenger as of right. In a case in Georgia [1] this problem is well covered. It appeared that there had been a wreck on a branch of the defendant's road, several miles from the town of Washington, by reason of which regular traffic on that branch had been suspended. A train was run from Washington to the scene of the wreck, and the plaintiffs and others requested permission of the conductor in charge of the train to ride thereon, which was granted. This train, on its return trip, did not leave the scene of the wreck until about midnight, and, when it did, the conductor, acting under instructions from the superintendent of the railroad, refused to transport the plaintiffs, who walked back to Washington and brought suit for the refusal. The court held that the action would not lie. Mr. Justice Candler said: "The train upon which the plaintiffs rode from Washington to the scene of the wreck was in no sense a regular passenger train. Indeed, it was neither regular nor passenger. Its sole purpose was to meet an emergency with which the employés of the defendant were confronted. This fact was well known to the plaintiffs. The defendant was under no obligation to transport them on this train at all." [2]

[1] Louisville & N. R. R. Co. v. Du Bose, 120 Ga. 339, 47 S. E. 917 (1904).

Upon similar principles it was recently held that a street railroad had the right to refuse to carry passengers on cars during their passage between the barns and the lines where they were to be put in service. Hermann v. St. Joseph Ry., Light, Heat & Power Co. (Mo. App.), 129 S. W. 414 (1910).

But if one is accepted upon a special car as a passenger he has the rights of one. McCarter v. Greenville Traction Co., 72 S. C. 134, 51 S. E. 545 (1905).

[2] See also:

*Georgia.*—Southwestern R. R. Co. v. Singleton, 66 Ga. 252 (1880).

*Missouri.*—Wagner v. Mo. Pac. Ry. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 146 (1888).

*Minnesota.*—Ahern v. Minn. St. Ry. Co., 102 Minn. 435 (1907).

*Tennessee.*—Louisville & N. R. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840 (1888).

**§ 755. Special freight trains.**

Where cars loaded with freight are to be hauled in a special train at special times not on the regular schedule and by a special arrangement, the railroad company in so hauling the cars is not a common carrier. This arrangement is commonly made between the owner of a circus and the railroad which transmits the establishment from one place of exhibition to another. The circus is transported in a special train, made up exclusively of the circus cars, on a special schedule of time, and for a price less than the regular rates; and the owner furnishes men to load and unload. For such transportation the railroad is not responsible as a common carrier.[1] In the leading case on the subject,[2] Mr. Justice Campbell said: "The business of common carrier, while it prevents any right to refuse the carriage of property such as is generally carried, implies, especially on railroads, that the business will be done on trains made up by the carrier, and running on their own time. It is never the duty of a carrier, as such, to make up special trains on demand, or to drive such trains made up entirely by other persons, or by their cars."

**§ 756. Regular train established upon special guaranty.**

If a regular train is established upon the guaranty by an individual of the expense of maintaining it, the rail-

[1] *United States.*—Chicago, M. & St. P. R. R. Co. v. Wallace, 66 Fed. 506, 30 L. R. A. 161 (1895); Wilson v. Atlantic C. L. R. R. Co., 129 Fed. 774 (1904).

*Indiana.*—Cleveland, C., C. & St. L. Ry. Co. v. Henry, 170 Ind. 94, 83 N. E. 710 (1908).

*Massachusetts.*—Robertson v. Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482 (1892).

*Michigan.*—Coup v. Wabash, St. L. & P. Ry. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374 (1885).

*New York.*—Brown v. Weir, 88 N. Y. Supp. 479, 95 App. Div. 78 (1904).

*Pennsylvania.*—Forepaugh v. Delaware, L. & W. R. R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508 (1889).

[2] Coup v. Wabash, St. L. & P. Ry. Co., *supra.*

road is none the less a common carrier in running the train, and it cannot give the guarantor an advantage over his business rivals. This question was raised and elaborately discussed in the case of Memphis News Publishing Company v. Southern Railway Company.[1] In that case it appeared that a railroad company contracted with a newspaper publisher, agreeing to run a special early morning train carrying only the newspapers of the publisher, in consideration of the publishing company guaranteeing to it a certain revenue from the operation of the train. This train became one of its scheduled trains, and was advertised as such. It was controlled exclusively by the company, and all the revenue derived from its operation in the carrying of passengers and freight was its property. It was held that the railroad could not, relying on its contract, refuse to carry on such train newspapers tendered it by a rival publishing house, which offered to comply with all the conditions as to indemnity, complied with by the house making the contract, and the fact that the publishing company solicited the institution of the train was held immaterial. One of the most enlightening opinions in the books as to the real extent of public duty was given upon this case by Chief Justice Beard. It concludes thus: "These general principles being established, what is there to prevent their application in this case? We see nothing. A railroad by its very nature, as has been seen, is a common carrier. The train in question is a scheduled one, advertised to the world as such. An invitation is given to the public to take passage and ship freight upon it. Its own employés, managers, and the railway company appropriate all its revenues. So far as the record shows, it receives on this train merchandise from every other member of the community, and refuses carriage alone to that of this complainant;

[1] 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150 (1903).

and this refusal is based, not upon a lack of carrying capacity, but exclusively upon the ground that it has contracted away its duty, in respect to such property as the complainant has tendered, to another party. Such an excuse cannot relieve the railway company from its obligations to complainant as one of the public." [1]

**§ 757. Excursion trains.**

When a railroad company hires a train to private individuals to use as an excursion train, the railroad in running the train is not strictly a common carrier,[2] and cannot be compelled to carry any person on the train who is not invited by the lessee.[3] "The railroad company, having provided for meeting the reasonable demands of the public for the carriage of passengers, is at liberty to employ its trains in its own way, with the proviso that these trains must, as a matter of public policy, be operated and run by its own qualified servants, for the protection and safety of life and property.[4] Nevertheless the railroad is under the same duty toward any person invited by the lessee, or to whom the latter sells a ticket, that it

[1] See also the following cases as to public trains in general:

*Arizona.*—Santa Fe, P. & P. Ry. Co. v. Grant Bros. C. Co. (Ariz.), 108 Pac. 467 (1910).

*Indiana.*—Citizens' St. Ry. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55 (1887).

*Iowa.*—Kellow, Jr., Admr., v. Cent. Ia. Ry. Co., 68 Ia. 470, 23 N. W. 740, 56 Am. Rep. 858 (1886).

*Minnesota.*—Oviatt v. Dak. Cent. Ry. Co., 43 Minn. 300, 45 N. W. 436 (1890).

*New York.*—Springer v. Wescott, 29 N. Y. Supp. 149, 78 Hun, 365 (1894).

*Tennessee.*—Nashville & C. R. R. Co. v. Messino, 1 Sneed, 220 (1853).

*Texas.*—Galveston C. R. R. Co. v. Hewitt, 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32 (1887).

[2] The cases on this subject are well collected in Fitzgibbons v. Chicago & N. W. R. R. Co., 108 Ia. 614, 79 N. W. 477 (1889).

[3] Moore v. St. Louis, I. M. & S. Ry., 67 Ark. 389, 55 S. W. 161 (1900).

[4] Bunn, C. J., in his dissenting opinion in Moore v. St. Louis, I. M. & S. Ry. Co., *supra.*

is under to any passenger. It is therefore liable to one who having been allowed by the lessee to buy a ticket is then refused by him permission to ride,[1] or is assaulted or insulted by other excursionists,[2] or is negligently injured by an accident to the train.[3] It should be pointed out, moreover, that if such a train is stopped at a regular station and a traveler is permitted to board it without being apprised of its character, he cannot be ejected from the train after it has pulled out.[4]

**§ 758. Chartered train.**

If an entire train, including the motive power, be chartered to a person who undertakes the entire management himself, the railroad is not a carrier of goods or persons carried on the train.[5] And so, where a railroad simply loaned a train to an association of railroad employees, who themselves operated and managed the train, the railroad was held not to owe the duty of a common carrier to persons riding on the train.[6] Where a single car is chartered and loaded by a shipper, and is then taken by the railroad for transportation, on its regular trains, the railroad is a carrier of the goods loaded in the car.[7] But where an express company obtained a train of cars

[1] Moore v. St. Louis, I. M. & S. Ry. Co., *supra*.

[2] Texarkana & F. S. Ry. Co. v. Anderson, 67 Ark. 123, 53 S. W. 673 (1899); White v. Norfolk & S. R. R. Co., 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489 (1894). See also Collins v. Texas & P. Ry. Co., 15 Tex. Civ. App. 169, 39 S. W. 643 (1897).

[3] Skinner v. London, B. & S. C. Ry. Co., 5 Ex. 787 (1850).

[4] Kirkland v. Charleston & W. C. Ry. Co., 79 S. C. 273, 60 S. E. 668, 15 L. R. A. (N. S.) 425 (1907), citing Harmon v. Columbia & G. R. R. Co., 28 S. C. 401, 5 S. E. 835, 13 Am. St. Rep. 686 (1887).

[5] East Tenn. & Ga. R. R. Co. v. Whittle, 27 Ga. 535, 73 Am. Dec. 741 (1859). See, however, Kirkland v. Charleston & W. C. Ry. Co., 79 S. C. 273, 60 S. E. 668, 15 L. R. A. (N. S.) 425 (1908).

[6] Davis v. Chicago, St. P., M. & O. R. R. Co., 45 Fed. 543 (1891).

[7] *Arkansas.*—Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961 (1892).

and an engine from a railroad for the purpose of makin a particular shipment of stock, no passengers being car ried except the owners of the stock and their employés the shipment being accompanied by the messenger o the express company, although the train was operate by the servants of the railroad, the railroad was held t be the mere agent of the express company for the trans portation and forwarding of the stock, and the expres company was held liable for the railroad's negligence.

*Topic B. Unusual Methods of Service*

**§ 759. Passengers traveling in an unusual place.**

When a person desiring to be transported enters a ca or other part of a railroad train not intended for passen gers, he does not thereby accept the carrier's invitation and if there is no express acceptance of him as a passenge he is not entitled to be so treated. In a Texas case [2] i appeared that an intending passenger, having money t pay his fare, came late to the station, and was just abl to get on board the front platform of the first car as th train started. This proved to be the front platform of baggage car. The fireman, discovering him, compelle him to jump off by turning hot water from a hose on him and in jumping he was injured. The Court of Civil Ap peals held that he could recover as a passenger. "While, they said, "the place one may be occupying upon th train at the time of his injury may be important in de

*Georgia.*—Central R. R. Co. v. Anderson, 58 Ga. 393 (1877).

*Illinois.*—Ohio & M. R. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291 (1858).

*Vermont.*—Kimball v. Rutland & B. R. R. Co., 26 Vt. 247, 62 Am. Dec. 567 (1854), apparently *contra.*

[1] American Exp. Co. v. Ogle (Tex. Civ. App.), 81 S. W. 102 (1904).

[2] Missouri, K. & T. Ry. Co. v Williams (Tex. Civ. App.), 40 S. W 350 (1897); in the upper cou Missouri, K. & T. Ry. Co. v Williams, 91 Tex. 255, 42 S. W Rep. 855 (1897).

termining whether or not he intended to pay his fare, it does not conclusively fix his status, either as a passenger or a trespasser." This decision was however reversed on appeal to the Supreme Court. One may become a passenger, the court said, by either an express or an implied contract. There was no express contract in this case; and "in order to raise such an implied contract, the party desiring to be carried by the railroad company must take passage on that part of the train provided by it for carrying passengers." [1]

**§ 760. Whether there is acceptance in such cases.**

As between the original decision and the final decision of the case just discussed, the latter, it seems, is preferable. The case is not like that of taking a wrong train by mistake; for there the person gets into a car intended for passengers, while here, as the Chief Justice pointed out, he knew that a baggage car was not prepared for the reception of passengers. The same facts came up in Illinois; [2] and it was held that the person did not become a passenger by getting safely upon the platform. "A passenger must put himself in the care of the railroad company, and there must be something from which it may fairly be implied

[1] A case almost identical in its facts was decided in South Carolina between the first decision and the appeal in the Texas case; and largely on the authority of the Texas Court of Civil Appeals the plaintiff was held to be a passenger. Chief Justice McIver dissented, taking the same ground on which the Supreme Court placed itself in the Texas case. Martin v. Southern Ry. Co., 51 S. C. 150, 28 S. E. Rep. 303 (1897).

A person who takes passage on the platform of a passenger coach on a railroad train and there continues his journey without entering the cars, in violation of the rules and regulations of the company, does not become a passenger, although his fare is demanded by, and paid to, the brakeman on the train, who is not authorized to demand or receive fares. Chicago & Erie R. R. Co. v. Field, 7 Ind. App. 172, 34 N. E. 406, 52 Am. St. Rep. 444 (1893).

[2] Illinois Central R. R. Co. v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 148, 61 Am. St. Rep. 68 (1897).

that the company had accepted him as a passenger." The distinction is to be noted between persons who havin once become passengers then go without permission of th company into some place not provided for passengers, an persons who, intending to become passengers, go in th first instance to such a place. While the latter do no technically become passengers at all, since they neve place themselves within the terms of the carrier's offer t receive them,[2] persons who have already become pas sengers do not forfeit that position by going into some ca or some part of a car in which passengers are not allowe to ride. Such conduct may be negligent, and if the negl gence contributes to an injury it may therefore bar re covery for the injury; but the recovery cannot be denie on the ground that the injured person was not a pas senger.[3]

**§ 761. Vehicle not intended for passengers.**

In general, a carrier who by his servants receives person to be carried on any vehicle or portion of a vehicl not provided by the carrier for passengers is not a commo carrier of such person; nor can such person demand to b carried in such a vehicle or place. On this principle, railroad is not a common carrier of a person who by permi

[1] Parks v. St. Louis & S. Ry. Co., 178 Mo. 108, 77 S. W. 70 (1903). See also Udell v. Citizens' St. Ry. Co., 152 Ind. 507, 52 N. E. 799 (1899).

[2] Bricker v. Philadelphia & R. R. Co., 132 Pa. 1, 18 Atl. 983, 19 Am. St. Rep. 585 (1890).

*United States.*—New Orleans & N. E. R. R. Co. v. Thomas, 60 Fed. 379, 9 C. C. A. 29, 23 U. S. App. 37 (1894) top of cattle car.

[3] *Arkansas.*—Little Rock & F. S. Ry. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10 (1883), top of freigl car.

*Kentucky.*—Kentucky Central I R. Co. v. Thomas, 79 Ky. 160, Am. Rep. 208 (1880), express car

*Massachusetts.*—Merrill v. Eas ern R. R. Co., 139 Mass. 238, 1 I E. 548, 52 Am. Rep. 705, (1885 step of steam car.

*Pennsylvania.*—Bard v. Pennsy vania Traction Co., 176 Pa, 97, Atl. 953, 53 Am. St. Rep. 6 (1896), bumper of street car.

sion of the carrier's servant or otherwise rides on a locomotive,[1] a hand car,[2] a railroad velocipede,[3] or a flat car.[4] And so a passenger, who without the knowledge or consent of the conductor of the train, rides in the baggage, mail, or express car, cannot maintain an action against the railroad company for injuries sustained which would not have happened to him had he been in a passenger car;[5] nor can he be heard to contend that the conductor ought to have discovered and ordered him out. But here too there are cases which go so far as to hold that one may be accepted as a passenger even in so unusual a vehicle by one high enough in authority to authorize unusual procedure.[6]

[1] *Illinois.*—Lake Shore & Mich. S. R. R. Co. v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510 (1887).

*Iowa.*—Ramm v. Minneapolis & St. L. R. R. Co., 94 Ia. 296, 62 N. W. 751 (1895).

*Massachusetts.*—Merrill v. Eastern R. R. Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705 (1885).

*Nebraska.*—Woolsey v. Chicago, B. & Q. R. R. Co., 39 Neb. 798, 58 N. W. 444, 25 L. R. A. 79 (1894).

*New York.*—Robertson v. New York & E. R. R. Co., 22 Barb. (N. Y.) 91 (1856).

*Oregon.*—Radley v. Columbia Southern R. R. Co., 44 Oreg. 332, 75 Pac. 212 (1904).

*South Carolina.*—Darwin v. Charlotte, C. & A. Ry. Co., 23 S. C. 531, 55 Am. Rep. 32 (1885).

*Texas.*—Wilcox v. San Antonio & A. Pass. R. R. Co., 11 Tex. Civ. App. 487, 33 S. W. 379 (1895).

*Virginia.*—Virginia Midland R. R. Co. v. Roach, 83 Va. 375, 5 S. E. 175 (1887).

[2] *North Carolina.*—Willis v. Atlantic R. R. Co., 120 N. C. 508, 26 S. E. 784 (1897).

*Ohio.*—Cincinnati, J. & M. R. R. Co. v. Morley, 4 Ohio Cir. Ct. 559 (1890).

*Oregon.*—Rathbone v. Oregon R. R. Co., 40 Oreg. 225, 66 Pac. 909 (1901).

*Texas.*—Prince v. International & Great Northern Ry. Co., 64 Tex. 144 (1885).

[3] *Georgia.*—Higgins v. Cherokee R. R. Co., 73 Georgia, 149 (1884).

*Louisiana.*—Snyder v. Natchez R. R. & T. R. R. Co., 42 La. Ann. 302, 7 So. Rep. 582 (1890).

[4] The Frank and Willie, 45 Fed. 488 (1891).

[5] *Kentucky.*—Kentucky Central R. R. Co. v. Thomas, 79 Ky. 160, 42 Am. Rep. 208 (1880).

*Pennsylvania.*—Bricker v. Philadelphia & Reading R. R. Co., 132 Pa. St. 1, 18 Atl. 983, 19 Am. St. Rep. 585 (1890).

[6] Lake Shore & Mich. S. R. R. v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510 (1887).

**§ 762. Carriage on construction trains.**

On these principles a railroad is not usually a common carrier of one who is received by its servants for carriage on a construction train. Certainly one who knowingly takes passage over an unfinished railway should not expect to be cared for as passengers are after regular service has begun.[1] Even after the road is in operation one riding upon a construction train,[2] a gravel train,[3] a lumber train,[4] or a train of flat cars [5] must appreciate that he is not being accepted as a passenger by the company. Yet even in these cases the possibility remains that one may be accepted even upon a construction train,if the circumstances are such as give him to understand that he is being especially received as a passenger. Thus where a person purchased a ticket and was accepted by the conductor of a construction train as a passenger thereon, against the carrier's orders, it was held that the conductor had apparent authority to accept him as a passenger.[6]

[1] *United States.*—Wade v. Lutcher Cypress Lumber Co., 74 Fed. 517, 33 L. R. A. 255, 41 U. S. App. 45, 20 C. C. A. 515 (1896).

*Indiana.*—Evansville & Richmond R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092 (1893).

*Kansas.*—Chicago, K. & W. Ry. Co. v. Frazer, 55 Kan. 582, 40 Pac. 923 (1895).

*Tennessee.*—Nashville & C. R. R. Co. v. Messino, 1 Sneed (Tenn.), 220 (1853), *semble.*

*Texas.*—San Antonio & A. P. Ry. Co. v. Robinson, 79 Tex. 608, 15 S. W. 584 (1891).

*Canada.*—McRae v. Canadian Pac. Ry. Co., Montreal, L. R. 4 S. C. 186 (1888).

[2] *Alabama.*—McCauley v. Tennessee, C. I. & R. R. Co., 93 Ala. 356, 9 So. 611 (1890).

*Missouri.*—Berry v. Missouri Pac. Ry. Co., 124 Mo. 223, 25 S. W. 229 (1894).

[3] *Indiana.*—Lawrenceburgh & Upper Miss. R. R. Co. v. Montgomery, 7 Ind. 474 (1856).

[4] Illinois Cent. Ry. Co. v. Meacham, 91 Tenn. 428, 19 S. W. 232 (1892).

[5] *Georgia.*—Higgins v. Cherokee R. R. Co., 73 Ga. 149 (1884), *semble.*

*Louisiana.*—Snyder v. Natchez R. R. & T. R. R. Co., 42 La. Ann. 302, 7 So. Rep. 582 (1890).

[6] Little Rock, M. R. & T. Ry. Co. v. Glidewell, 39 Ark. 487 (1882).

See also on this topic:

*Tennessee.*—Nashville & C. R. R. Co. v. Messino, 1 Sneed (Tenn.), 220 (1853).

*Kansas.*—St. Joseph & Western

**§ 763. Passenger carriage on freight trains.**

It often happens that persons are received by the employés of the carrier upon freight trains. In accordance with the principles now under examination, such a reception will make the person a passenger provided the reception is within the authority of the servant, either because of express permission given by the carrier, or because the reception is within the apparent authority of the servant. A case of the first kind occurs when a railroad is accustomed to carry passengers in freight cars.[1] Where such a custom exists, one received on a freight train is to be regarded as a passenger quite as much as one who rides on an ordinary passenger train. A case of the second kind occurs when passengers are not uncommonly so carried on freight trains in that part of the country, and one is permitted to ride on such a train by the conductor.[2] When for either reason the conductor has apparent authority to receive a passenger, and does so, the relation of carrier and passenger is established.[3] But in any case

R. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461 (1886).

[1] Long continued violation of the carriers' rules prohibiting the carriage of passengers upon freight trains as such, so notorious that this must have come to the notice of the company has the same effect.

*Missouri.*—Jones v. Wabash, St. L. & P. Ry. Co., 17 Mo. App. 158 (1885).

*Texas.*—Missouri, K. & T. Ry. Co. v. Huff, 98 Texas, 110, 81 S. W. 525 (1904).

[2] The fact that the train in question was a freight train on which, under the rules of the company, passengers were not permitted to ride, does not render the person injured any the less a passenger, when at the time he bought his ticket he had no knowledge of such rules and took the train under the instructions of an agent of the company.

*Alabama.*—Louisville & N. Ry. Co. v. Hine, 121 Ala. 234, 25 So. 857 (1899).

*Illinois.*—Illinois Cent. R. R. Co. v. Davenport, 177 Ill. 110, 52 N. E. 266 (1898).

*Missouri.*—McGee v. Missouri Pac. Ry. Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706 (1887).

*Texas.*—Texas & Pac. Ry. Co. v. Black, 87 Tex. 160, 27 S. W. 118 (1894).

[3] *United States.*—Hazard v. Chicago, B. & Q. R. R. Co., 1 Biss. 503,

when thus bound to such persons as to passengers, it is gen erally held that only such care is owed such passengers a is practicable in connection with the operation of freigh trains.[1]

Fed. Cas. No. 6,275 (1865); Reber v. Bond, 38 Fed. 822 (1889).

*District of Columbia.* — United States v. Saul, 58 Fed. 763 (1893).

*Georgia.*—Crine v. East Tennessee V. & G. Ry. Co., 84 Ga. 651, 11 S. E. 555 (1890).

*Illinois.*—Chicago & Alton R. R. Co. v. Winters, 175 Ill. 293, 51 N. E. 901 (1898).

*Indiana.*—Ohio & M. R. Ry. Co. v. Dickerson, 59 Ind. 317 (1877).

*Kansas.*—Missouri Pacific Ry. Co. v. Holcomb, 44 Kan, 332, 24 Pac. 467 (1890).

*Maine.*—Dunn v. Grand Trunk Ry. Co., 58 Me. 187, 4 Am. Rep. 267 (1870).

*Michigan.*—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557, 95 N. W. 546 (1903).

*Mississippi.*—Perkins v. Chicago S. L. & N. O. R. R. Co., 60 Miss. 726 (1883).

*Missouri.*—Wagner v. Missouri Pac. Ry. Co., 97 Mo. 512, 10 S. W. 486, 3 L. R. A. 156 (1888); Whitehead v. St. Louis, I. M. & S. Ry. Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409 (1889).

*Nebraska.*—Chicago, B. & Q. R. R. Co. v. Troyer, 70 Neb. 293, 103 N. W. 680 (1905).

*New Hampshire.*—Murch v. Concord R. R. Corp., 29 N. H. 9, 61 Am. Dec. 631 (1854).

*New York.*—Edgerton v. New York & H. R. R. R. Co., 39 N. Y. 227 (1868).

*Ohio.*—Allen v. Lake Shore & Mich. S. Ry. Co., 57 Ohio St. 79, 4 N. E. 1037 (1897).

*Texas.*—I. & G. N. Ry. Co. v Irvine, 64 Tex. 529 (1885); Missour K. & T. Ry. Co. v. Huff, 98 Tex 110, 81 S. W. 525 (1904).

*Wisconsin.*—Lucas v. Milwauke Ry. Co., 33 Wis. 41 (1873).

*West Virginia.*—Boggess v Chesapeake & O. Ry. Co., 37 W. Va 297, 16 S. E. 525 (1892).

[1] *United States.*—Sprague v Southern Ry. Co., 92 Fed. 59, 3 C. C. A. 207 (1899).

*California.*—Wieland v. Souther Pac. Co., 1 Cal. App. 343, 82 Pac 226 (1905).

*Georgia.*—Central of Georgia Ry Co. v. Lippman, 110 Ga. 665, 3 S. E. 202, 50 L. R. A. 673 (1900).

*Illinois.*—Chicago & A. R. Co. v Arnol, 144 Ill. 261, 33 N. E. 204, 1 L. R. A. 313 (1893).

*Minnesota.*—Campbell v. Dulut & N. E. Ry. Co., 107 Minn. 358, 12 N. W. 375, 22 L. R. A. (N. S.) 19 (1909).

*Missouri.*—Green v. Missouri, K & T. Ry. Co., 121 Mo. App. 720, 9 S. W. 646 (1906).

*North Carolina.*—Means v. Caro lina Cent. R. Co., 124 N. C. 57 32 S. E. 960, 45 L. R. A. 16 (1899).

*Oklahoma.*—St. Louis & S. F. Ry Co. v. Gosnell, 23 Okla. 588, 1 Pac. 1126, 22 L. R. A. (N. S.) 8 (1909).

**§ 764. Such transportation often upon a private basis.**

If, however, a passenger is received by the servant of the carrier upon a freight train under circumstances which show that he knows, or at least should know, that persons are not carried as passengers, where, therefore, it is sufficiently plain that the conductor has no authority to permit him to ride as such, even if he can be induced to do so, he does not become a passenger whether he pays fare or not; and *a fortiori* where the conductor informs him that passengers are forbidden to ride on a freight train, but he persuades the conductor to let him ride, nevertheless he is not a passenger.[1] The acceptance, that is, in such cases is upon a private basis and the special liabilities which are imposed upon common carriers of passengers are therefore not involved. In comparing the cases in this section with those in the preceding one it will be obvious that whether the service is upon a public basis or a private basis is in last analysis more a question of fact than a question of

[1] *United States.*—Shoemaker v. Kingsbury, 12 Wall. 369, 20 L. ed. 432 (1870); Purple v. Union Pacific R. R. Co., 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700 (1902).

*California.*—Wieland v. Southern Pacific Co., 1 Cal. App. 343, 82 Pac. 226 (1905).

*Connecticut.*—Bergan v. Central Vt. Ry. Co., 82 Conn. 574, 74 Atl. 937 (1909).

*Indiana.*—Smith v. Louisville, E. & St. L. R. R. Co., 124 Ind. 394, 24 N. E. 753 (1890).

*Kentucky.*—Ohio Valley Ry. Co. v. Watson's Admr., 93 Ky. 654, 21 S. W. 244, 40 Am. St. Rep. 211, 19 L. R. A. 310 (1893).

*Maine.*—Dunn v. Grand Trunk Ry. Co., 58 Me. 187, 4 Am. Rep. 267 (1870).

*Massachusetts.*—Powers v. Boston & Maine R. R. Co., 153 Mass. 188, 26 N. E. 446 (1891).

*New York.*—Eaton v. Delaware, L. & W. R. R. Co., 57 N. Y. 382, 15 Am. Rep. 513 (1874).

*Tennessee.*—Washburn v. Nashville & C. R. R. Co., 3 Head (Tenn.), 638, 75 Am. Dec. 784 (1859); Railroad Co. v. Hailey, 94 Tenn. 383, 29 S. W. 367, 27 L. R. A. 549 (1895).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19. (1890).

*Utah.*—Everett v. Oregon, S. L. & U. N. Ry. Co., 9 Utah, 340, 34 Pac. 289 (1893).

*Wisconsin.*—Lucas v. Milwaukee & St. Paul Ry. Co., 33 Wis. 41, 14 Am. Rep. 735 (1873).

law. But the undertaking need not be explicit, the parties may act upon reasonable inferences.[1]

**§ 765. Special services in telephoning.**

This topic may be concluded with examples drawn from other public callings of the general doctrine that public service may be undertaken beyond usual obligation in particular cases by special acceptance. Thus although the usual profession of the telephone company is to put its patrons into communication so that they may have speech with each other, it may in particular instances be shown to have undertaken more. The sending for a person to come to a toll office may often be seen to be a special favor that is being extended, but it is not impossible that it may be part of the service undertaken.[2] Again, although the telephone company does not commonly undertake the delivery of messages, it may have done enough so that a particular customer may understand that when such service is undertaken for him it is upon a public basis.[3] And likewise a telegraph company may agree to deliver by telephone a message addressed to a person living beyond the free delivery limits.[4] This follows the usual rule that when a telegraph company deliberately

[1] To put an extreme illustration: In one case it appeared that the passenger was informed by a servant of the carrier that he could not, under the carrier's rules, attach his own freight car to a passenger train and ride in it, as he desired to do; but the servant afterwards permitted it. He was held to be a passenger. Lackawanna & B. R. R. Co. v. Chenewith, 52 Pa. 382, 91 Am. Dec. 168 (1866).

But that the usual inference would be to the contrary is plain. Among the cases cited in the preceding note, see particularly Eaton v. Delaware, L. & W. R. R. Co., 57 N. Y. 382, 15 Am. Rep. 513 (1874).

[2] See, for one example, Central Union Telephone Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035 (1895).

[3] See, for one example, Telephone Co. v. Brown, 104 Tenn. 56, 55 S. W. 155, 78 Am. St. Rep. 906 (1900).

[4] Lyles v. Western Union Tel. Co. 77 S. C. 174, 57 S. E. 725, 12 L. R. A. (N. S.) 534 (1906).

undertakes to deliver messages outside its regular limits it is bound to do so.[1]

**§ 766. Unrepeated telegrams.**

Unrepeated telegrams probably belong here; for the real issue as to them it seems, is whether the taking of telegrams to be repeated should be considered the regular business, so that the sending of unrepeated telegrams may be treated as outside the usual course. Upon the usual facts, it must be said, this is not true. Indeed it is the unrepeated message which is the regular course, the repeated one being rare indeed. Nevertheless, by what is apparently the weight of authority [2] an agreement that the telegraph company shall not be held liable for mistakes in unrepeated telegrams although caused by their negligence is held valid, notwithstanding upon general principles such agreements as to regular service are held void as against public policy. Therefore those cases which hold that as the unrepeated business is the regular business such an agreement is inconsistent with the public

[1] *North Carolina.* — Rosser v. Western Union Telegraph Co., 130 N. C. 251, 41 S. E. 378 (1902).

*Texas.*—Western Union Tel. Co. v. Warren (Texas), 36 S. W. 314 (1986); Western Union Tel. Co. v. Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532 (1893); Evans v. Western Union Tel. Co. (Tex. Civ. App.), 56 S. W. 609 (1900).

[2] *United States.* — Primrose v. Western Union Tel. Co., 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. 1098 (1894).

*California.* — Coit v. Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153 (1900).

*Kentucky.* — Camp v. Western Union Tel. Co., 1 Met. (Ky.) 164, 71 Am. Dec. 461 (1858).

*Maryland.*—United States Tel. Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519 (1868).

*Michigan.*—Western Union Tel. Co. v. Carew, 15 Mich. 525 (1867).

*New York.*—Breese v. United States Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526 (1871).

*Pennsylvania.*—Western Union Tel. Co. v. Stevenson, 128 Pa. 442, 18 Atl. 441, 5 L. R. A. 515, 15 Am. St. Rep. 687 (1889).

*England.*—McAndrew v. Electric Telegraph Co., 17 C. B. 3 (1855).

*Canada.*—Baxter v. Dominion Telegraph Co., 37 U. C. Q. B. 470 (1875).

duty of the telegraph companies seem to be better upon theory.[1]

*Topic C. Peculiar Conditions of Service*

**§ 767. Owner accompanying his goods.**

If the owner of goods goes along with them and retains possession of them, the person who furnishes the vehicle is not a carrier, since he is not a bailee. This was the position of affairs presented by the leading case of the East India Company v. Pullen.[2] The defendant in that case was a common lighterman. "It was the usage of the company on the unshipping of their goods to clap an officer, who is called a guardian, in the lighter, who, as soon as the lading is taken in, puts the company's lock on the hatches, and goes with the goods to see them safe delivered at the warehouse." This usage having been followed, and part of the goods lost, the company sued the defendant. At the trial, before Lord Chief Justice Raymond, the court "was of opinion this differed from the common case, this not being any trust in the defendant, and the goods were not to be considered as ever having been in his possession, but in the possession of the company's servant, who had hired the lighter to use himself. He thought, therefore, the action was not maintainable, so the plaintiffs were nonsuited." [3] But in a later case where a servant

[1] *Alabama.*—Western Union Tel. Co. v. Chamblee, 122 Ala. 428, 25 So. 232, 82 Am. St. Rep. 89 (1898).

*Illinois.*—Tyler v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38, 74 Ill. 168 (1871).

*Kansas.*—Western Union Tel. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795 (1888).

*Maine.*—Ayer v. Western Union Tel. Co., 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353 (1887).

*North Carolina.*—Brown v. Postal Tel Co., 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793 (1892).

*Ohio.*—Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500 (1881).

[2] 1 Strange, 690 (1726).

[3] See White v. Winnisimmet Co., 7 Cush. 155 (1851), and New York v. Starin, 106 N. Y. 1, 12 N. E. 631 (1887).

of the shipper went along with the carrier, on account of the carrier being a stranger to the shipper, this was held not to negative the carrier's responsibility, the case being distinguished from the usage of the East India Company, "who never intrust the lighterman with their goods, but give the whole charge of the property to one of their officers." In this case,[1] the court said the defendant "must have had possession of them for the purpose of carrying his contract into effect, which he could not have done without such possession." [2]

**§ 768. Carrier in general control.**

The difficult cases are those in which both the carrier of these goods and the owner who accompanies them have a certain degree of control over them. In such cases the question of fact would seem to be as to which has the superior right. In a leading case [3] in the Supreme Court of the United States the carrier was engaged in transporting a body of soldiers and their baggage, an armed guard accompanying the baggage, which the soldiers themselves packed in the car. Mr. Justice Field, speaking for the court, said "If it were admitted that a special guard was appointed for the car on the route the admission would not aid the company or relieve it of liability. The control and management of the car, or of the train, by the servants and employés of the company were not impeded or interfered with, and where no such interference is attempted it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety." In another important case [4] a railroad company which was

[1] Robinson v. Dunmore, 2 B. & P. 416 (1801).

[2] See also Brind v. Dale, 8 C. & P. 207 (1837); Cohen v. Frost, 2 Duer, 335 (1853); Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455 (1838).

[3] Hannibal R. R. Co. v. Swift, 12 Wall. 262, 20 L. ed. 423 (1870).

[4] Terre Haute & Ind. R. R. Co. v.

being paid for hauling the locomotives of another road put one of their employés in the cab in charge of the train movements. It was held that as the railroad thus took control of the situation it was liable for a collision although the company that owned the engines furnished an engineer and mechanics to operate it under the instructions of the pilot.

### § 769. Luggage carried by passengers.

Where a passenger takes with him in the vehicle in which he is carried small articles of personal baggage it may be difficult to determine how far the responsibility of the carrier extends to them. The English law, dating from an early case,[1] where a stage driver was held responsible for the loss of the portmanteau of a passenger, goes so far as to hold the railroad responsible as a carrier for hand luggage brought by the passenger into the carriage and kept by him during the journey.[2] "It is the every day's practice of passengers by railways" said the court in a leading case,[3] "to carry cloaks and such like articles with them in the carriages, with the consent of the company, and it cannot be said that the company have on that account parted with their custody of them as carriers." It is, however, clear enough on the authorities that the carrier is not, under such circumstances, an insurer and that the amount of care required of it is materially lessened by the fact that the passenger is in actual control. In this country (very likely because of a different usage as to the matter), it has never been supposed that the rail

Chicago, Peoria & St. L. Ry. Co., 150 Ill. 502, 37 N. E. 915 (1894).

[1] Chambre, J., in Robinson v. Dunmore, 2 B. & P. 416, 419 (1801).

[2] Munster v. South Eastern Ry. Co., 4 C. B. (N. S.) 676, 27 L. J. (C. P.) 308 (1858).

[3] Lush, J., in Le Conteur v. London & S. W. Ry. Co., 6 B. & S. 961, L. R. 1 Q. B. 54 (1865).

[4] Talley v. Gt. Western R. R. Co., L. R. 6 C. P. 44 (1870).

road company assumed possession of personal luggage taken into its train by a passenger; and it has therefore never been held liable for such luggage as carrier.[1] And so a steamboat company is not a carrier of the passenger's watch and clothing, which he wears on his person, or the luggage he takes with him into his stateroom, since the possession of it is not given to the company.[2] And sleep-

[1] *United States.*—Henderson v. Louisville & N. R. R. Co., 123 U. S. 61, 31 L. ed. 92 (1887); Walsh v. The Wright, Newb. Adm. (U. S.) 494, Fed. Cas. No. 17,115 (1854); Bacon v. Pullman Co., 159 Fed. 1, 89 C. C. A. 1, 16 L. R. A. (N. S.) 578 (1908).

*Illinois.*—Chicago, R. I. & P. R. R. Co. v. Fairclough, 52 Ill. 106 (1869).

*Massachusetts.*—Murray v. International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290 (1898); Kingsley v. Lake Shore Ry. Co., 125 Mass. 54, 28 Am. Rep. 200 (1878).

*Minnesota.*—McKibbin v. Wisconsin Cent. R. Co., 100 Minn. 270, 110 N. W. 964 (1907).

*Mississippi.*—Illinois Cent. Ry. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846 (1886).

*New York.*—Weeks v. New York, N. H. & H. R. R. Co., 72 N. Y. 50, 28 Am. Rep. 104 (1878); Schalscha v. Third Ave. R. R. Co., 19 Misc. (N. Y.) 141, 43 N. Y. Supp. 251 (1897).

*Ohio.*—Greenfield First National Bank v. Marietta & C. R. R. Co., 20 Ohio St. 259, 5 Am. Rep. 655 (1870).

*Pennsylvania.*—American Steamship Co. v. Bryan, 83 Pa. St. 446 (1877).

*Texas.*—Bonner v. Demendoza (Texas App., 1891), 16 S. W. 976 (1891).

[2] *United States.*—The R. E. Lee, 2 Abb. (U. S.) 49, Fed. Cas. No. 11,690 (1870); Walsh v. The H. M. Wright, Newb. Adm. (U. S.) 494, Fed. Cas. No. 17,115 (1854).

*Kentucky.* — Steamboat Crystal Palace v. Vanderpool, 16 B. Monr. (Ky.) 302 (1855).

*Maine.*—Abbott v. Bradstreet, 55 Me. 530 (1868).

*Massachusetts.*—Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456 (1875).

*Michigan.*—McKee v. Owen, 15 Mich. 115 (1866).

*Pennsylvania.*—American St. Ship Co. v. Bryan, 83 Pa. St. 446 (1877).

*Wisconsin.*—Gleason v. Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716 (1873).

*Contra, New York.*—Gore v. Norwich Trans. Co., 2 Daly (N. Y.), 254 (1867); Mudgett v. Bay State Steamboat Co., 1 Daly (N. Y.), 151 (1861); Van Horn v. Kermit, 4 E. D. Smith (N. Y.), 453 (1855); Crozier v. Boston, N. Y. & M. Steamboat Co., 43 How. Pr. (N. Y.) 466 (1871). These cases place the liability of the company on the same ground as that of an innkeeper.

ng car companies are held liable for the hand baggage of passengers only upon the same theory; but of course the danger from theft from sleeping passengers being peculiar, the company owes to them the utmost protection, and the porter must keep continual watch.[1] But in any case the companies ought to be held liable for luggage actually ntrusted to porters in the regular course of business.[2]

**§ 770. Special arrangements with innkeepers.**

In order for the innkeeper to become responsible for the goods of his guest it is not necessary that the possession of them should be given up to the innkeeper; so where the innkeeper gives the guest a key [3] to his room and the guest takes the goods to his room and keeps them there, the innkeeper is liable for the safety of the goods.[4] But while it is not necessary, in order to make the innkeeper responsible for the goods, that they should be delivered into his possession, still they must be within his general care and control. If the guest himself undertakes the care of them, or if he makes a special arrangement by

[1] *United States.*—Barrott v. Pullman Palace Car Co., 51 Fed. 796 (1892).

*Alabama.*—Cooney v. Pullman Palace Car Co., 121 Ala. 368, 25 So. 712, 53 L. R. A. 690 (1898).

*Georgia.*—Pullman Palace Car Co. v. Martin, 95 Ga. 314, 22 S. E. 700, 29 L. R. A. 498 (1894).

*Kentucky.*—Pullman Palace Car Co. v. Hunter, 21 Ky. L. Rep. 1248, 54 S. W. 845, 47 L. R. A. 286 (1900).

*Massachusetts.*—Whicher v. Boston & A. R. R. Co., 176 Mass. 275, 57 N. E. 601 (1900).

*Mississippi.*—Ill. Cent. Ry. Co. v. Handy, 63 Miss. 609, 56 Am. Rep. 846 (1886).

*Missouri.*—Hampton v. Pullman Car Co., 42 Mo. App. 134 (1890).

*New York.*—Williams v. Webb, 22 Misc. (N. Y.) 513, 49 N. Y. Supp. 1111, 27 Misc. (N. Y.) 508, 58 N. Y. Supp. 300 (1898).

[2] Richards v. London B. & S. C. Ry. Co., 7 C. B. 839, 18 L. J. (C. P.) 251 (1849); Butcher v. London & S. W. Ry. Co., 16 C. B. 13, 24 L. J. (C. P.) 137 (1855); Le Conteur v. London & S. W. Ry. Co., 6 B. & S. 961, L. R. 1 Q. B. 54 (1865).

[3] Y. B., 42 Ed. 3, pl. 13 (1367); 11 H. 4, 45 pl. 18 (1410).

[4] Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198 (1892).

which the control of them is removed from the innkeeper, the latter is not liable.[1] Thus in an old case the innkeeper gave the guest his keys, and went away; and the goods were lost. It was held that the innkeeper was not liable.[2] Upon similar principles, where a guest places his overcoat or gloves in the place provided for them in the inn, although the innkeeper is not notified of the fact, the liability of the innkeeper attaches.[3] But where the guest's personal baggage is placed in a public room in the inn, without the knowledge of the innkeeper, or even by the special request of the guest, the innkeeper is liable.[4]

**§ 771. Goods taken across a ferry.**

In the case of a ferry, the fact that the owner usually goes along with the goods and often retains the entire charge and management of them (as for instance where he drives a horse on the ferryboat and manages him while on the boat), materially modifies the relation of carrier and shipper, so that the carrier may not be responsible for any injury caused by defect in placing or managing the property; but this does not necessarily prevent the ferryman from being a carrier. In one of the early cases [5] the law was thus stated: "It is the duty of the ferryman to see that teams are safely driven on board the boat; he may drive himself, or unharness the team, or unload them,

[1] Vance v. Throckmorton, 5 Bush (Ky.), 41, 96 Am. Dec. 327 (1868).

[2] Y. B., 11 Hen. 4, 45, pl. 18 (1410).

[3] *Maine.*—Norcross v. Norcross, 53 Me. 163 (1865).

*New York.*—McDonald v. Edgerton, 5 Barb. 560 (1849).

*Vermont.*—Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560 (1868).

*Ireland.*—Shaw v. Ray, 1 Cr. & Dix. C. C. 84 (1839).

[4] *Kentucky.*—Packard v. Northcraft's Admr., 2 Met. 439 (1859).

*Maryland.*—Burrows v. Trieber, 21 Md. 320, 83 Am. Dec. 590 (1863).

*New York.*—Bradner v. Mullen, 27 N. Y. Misc. 479, 59 N. Y. Supp. 178 (1899).

*England.*—Richmond v. Smith, 8 B. & C. 9, 2 M. & Ry. 235 (1828).

[5] May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135 (1855).

for the purpose of getting them safely on board; but if he permits the party to drive himself, he constitutes him, *quoad hoc*, his agent, and is still responsible for all accidents." And, indeed, where the ferryman takes such charge of the passenger's goods (as was probably the ordinary case in the older ferries), the ferryman is a carrier of the goods as well as of the passenger.[1] The modern ferryman, however, seldom concerns himself with the property of the traveler; and while he is, of course, a carrier of the passenger, the goods are not so bailed to him as to constitute him a carrier of the goods. As Mr. Justice Dewey said in the leading case:[2] "The only possession and custody, by the ferryman, of the horse and vehicle to which he is attached, is that which necessarily results from the traveler's driving his horse and wagon, or other vehicle, on board the boat and paying the ordinary toll for passage."[3]

**§ 772. Owner going with his freight.**

Though the owner of cattle or his servant may accompany the cattle, as a drover, while they are being carried, and may care for them, feed and water them, and help

[1] *Accord* are:

*Arkansas.*—Evans v. Rudy, 34 Ark. 383 (1879).

*Illinois.*—Fisher v. Clisbee, 12 Ill. 344 (1851).

*New York.*—New York v. Starin, 106 N. Y. 1, 12 N. E. 631 (1887).

*Ohio.*—Wilson v. Hamilton, 4 Ohio St. 722 (1855).

*South Carolina.*—Cook v. Gourdin, 2 N. & McC. 19 (1819).

*England.*—East India Co. v. Pullen, 2 Strange, 690; Walker v. Jackson, 10 M. & W. 161 (1842).

[2] In White v. Winnisimmet Co., 7 Cush. 155 (1851).

[3] *Accord* are:

*Arkansas.*—Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595 (1870).

*Indiana.*—Yerkes v. Sabin, 97 Ind. 141, 49 Am. Rep. 434 (1884).

*New Jersey.*—Dudley v. Camden & P. Ferry Co., 42 N. J. Law, 25 36 Am. Rep. 501 (1880).

*New York.*—Wyckoff v. Queens County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650 (1873).

Goods taken across a bridge.—As intimated in the text, bridge proprietors are not held responsible as carriers for goods taken across them by their owners. Grigsby v Chappell, 5 Rich. L. (S. C.) 443 (1852).

load and unload them, the railroad company is none the less the bailee and carrier of the cattle.[1] He must do all this while the cattle are in the possession of the railroad company and at such times as it chooses to select for the purpose.[2] But to go to an opposite extreme it has been held in the many cases which have arisen that the railroad company is not a common carrier of circus trains which it hauls under special agreement, the keeping of the wild beasts obviously remaining with the servants of the proprietors.[3] And the same rule applies where the keepers of a race horse in transit assume direct charge of it.[4]

## § 773. Switching cars.

Whether switching cars constitutes common carriage

[1] Dennison, J., in Atchison, T. & S. F. R. R. v. Ditmars, 3 Kan. App. 459, 43 Pac. 833 (1896).

[2] *Alabama.*—Southern Ry. Co. v. Webb, 143 Ala. 304, 39 So. 262; Webb v. Southern Ry. Co., Id. (1905).

*Arkansas.*—Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961 (1892).

*Kentucky.*—Illinois Cent. Ry. Co. v. Eblen, 71 S. W. 919, 24 Ky. Law Rep. 1609 (1903).

*Louisiana.*—Peters v. New Orleans & Gt. N. R. R. Co., 16 La. Ann. 222, 79 Am. Dec. 578 (1861).

*Missouri.*—Duvenick v. Mo. Pac. Ry. Co., 57 Mo. App. 550 (1894).

*Nebraska.*—Chicago, B. & Q. Ry. Co. v. Slattery, 107 N. W. 1045 (1906).

*New Jersey.*—Feinberg v. Delaware, L. & W. R. R. Co., 52 N. J. L. 451, 20 Atl. 33 (1890).

*New York.*—Harris v. Northern Indiana R. R. Co., 20 N. Y. 232 (1859).

[3] *United States.*—Chicago, M. & St. P. R. R. Co. v. Wallace, 66 Fed. 506, 14 C. C. A. 257, 30 L. R. A. 161 (1895); Wilson v. Atlantic C. L. R. R. Co., 129 Fed. 774 (1904).

*Indiana.*—Cleveland, C., C. & St. L. Ry. Co. v. Henry, 170 Ind. 94, 83 N. E. 710 (1908).

*Massachusetts.*—Robertson v. Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482 (1892).

*Michigan.*—Coup v. Wabash, St. L. & P. Ry. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374 (1885).

*New York.*—Brown v. Weir, 95 N. Y. App. 78, 88 N. Y. Supp. 479 (1904).

*Pennsylvania.*—Forepaugh v. Delaware, L. & W. R. R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508 (1889).

[4] Bowie v. B. & O. R. R. Co., 1 MacArthur, 94 (1873).

depends as in all these cases upon the exact condition upon which the service is rendered. If the full possessio is not given over to the switching company it is not carrier, even though it furnishes transportation. Thu a bridge company [1] which owns a bridge used by a rail road company is not a carrier of the goods hauled ove it by the railroad, even if the bridge company itself fur nishes the motive power for hauling cars over its tracks for while it hauls the cars, it has no possession of the con tents of the cars, which remain at all times in the posses sion of the railroad company as the carrier.[2] But ther are switching companies [3] which assume full control o the cars being transported by them through their corp of train men as fully as any connecting carrier would and this of course constitutes common carriage.[4]

**§ 774. Towing vessels.**

The apparant conflict of authority as to whether towag is carriage disappears when this principle is observed that the conditions of the service determine its character It will then be seen that sometimes the towboat does ac as a carrier, but often the facts show that the tugboa in question did not. Thus the towing lines which accep barges from various owners which are incorporated int the tow, all under the direct control of the towing boat may properly be said to be common carriage; and whe this is indisputably shown the towboat is usually hel liable as an insurer.[5] On the other hand the harbor tu which tows vessels in and out could rarely be said to b

[1] Kentucky & I. Bridge Co. v. Louisville & N. R. R. Co., 37 Fed. 567, 2 L. R. A. 289 (1889).

[2] Swift Co. v. Ronan, 103 Ill. App. 475 (1902).

[3] Norfolk & P. Belt Line R. R. Co. v. Commonwealth, 103 Va. 289, 49 S. E. 39 (1904).

[4] United States v. Sioux City S Y. Co., 162 Fed. 556 (1908).

[5] *United States.*—Vanderslice v The Superior, 28 Fed. Cas. No 16,843 (1850).

*California.*—White v. Mary Ann 6 Cal. 462, 65 Am. Dec. 523 (1856)

*Louisiana.*—Bussey v. Mississipp

undertaking common carriage, since real possession is retained by the master of the ship, and in such case tugboat is held liable only for due care.[1]

## § 775. Responsibility for through cars.

It is of course plain that where a railroad takes over a car from any shipper and then incorporates it in its own trains for further transportation, it takes the position of carrier although there is no breaking of bulk.[2] Simi-

Valley Transp. Co., 24 La. Ann. 165.

*North Carolina.*—Walston v. Myers, 5 Jones (N. C.), 174 (1857).

*New Jersey.*—Ashmore v. Penn. Steam Towing Trans. Co., 28 N. J. 180 (1860).

[1] *United States.*—Steamer New Philadelphia, 1 Black, 62, 17 L. ed. 84 (1861); The Quickstep, 9 Wall. 66, 19 L. ed. 767 (1869); Steamer Webb, 14 Wall. 406, 20 L. ed. 774 (1871); The Margaret, 94 U. S. 494, 24 L. ed. 146 (1876); Transportation Line v. Hope, 95 U. S. 297, 24 L. ed. 477 (1877); The Princeton, 3 Blatch. 54, Fed. Cas. No. 11,434 (1853); The Lyon, 1 Brown's Adm. 59, 15 Fed. Cas. 8,645 (1861); Steamboat Angelina Corning, 1 Ben. 109, Fed. Cas. No. 13,525 (1867); The Oconto, 5 Biss. 460, Fed. Cas. No. 10,421 (1873); The Merrimac, 2 Sawyer, 586, Fed. Cas. No. 9,478 (1874); The Neaffie, 1 App. 465 (1807).

*Illinois.*—Knapp v. McCaffrey, 178 Ill. 107, 52 N. E. 898, 69 Am. St. Rep. 290 (1899), aff'd 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. 824 (1900), giving a lien for towage although it is not carriage.

*Kentucky.*—Varble v. Bigley, 14 Bush, 698, 29 Am. Rep 435 (1879).

*Maryland.*—Pennsylvania D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543 (1836).

*Massachusetts.*—Sproul v. Hemmingway, 14 Pick. 1, 25 Am. Dec. 350 (1833).

*New York.*—Caton v. Rumney, 13 Wend. 387 (1835); Alexander v. Greene, 3 Hill, 9 (1842), 7 ibid. 533 (1844); Wells v. Steam Nav. Co., 2 N. Y. 204 (1849); Merrick v. Brainard, 38 Barb. 574 (1860); Arctic Fire Ins. Co. v. Austin, 54 Barb. 559 (1869); Abbey v. Steamboat Stevens, 22 How. Pr. 78 (1861); Emiliusen v. Penn. R. R. Co., 30 N. Y. App. Div. 203, 51 N. Y. Supp. 606 (1898).

*Pennsylvania.*—Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. Dec. 587 (1851); Hays v. Paul, 51 Pa. St. 134, 88 Am. Dec. 569 (1865); Brown v. Clegg, 63 Pa. St. 51, 3 Am. Rep. 522 (1869); Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445 (1874).

*England.*—The Julia, 14 Moore P. C. 210 (1860); Symonds v. Pain, 6 Hurl. & N. 709 (1861); The Minnehaha, 1 Lush, 335 (1861).

[2] *Arkansas.*—Fordyce v. Mc-

larly when a railroad takes over even a train from connection and draws it over its own line with its ow employés in charge it is obviously now the carrier.[1] Bu when it merely furnishes haulage for the trains of anothe road it seems clear that the original carrier maintain its position as such, the hauling company being liabl only for its negligence in that service.[2] And where on railroad has running rights over the rails of another i is plain that the company operating the train throug remains the carrier.[3]

**§ 776. Relations with dependent services.**

The effect upon the arrangements between a princip service and a dependant service upon the situation a regards the public is sometimes difficult to determine. I the case of express service the proper theory is held tha the express company holds itself out as the common ca rier,[4] to the general public and that the railroad acts as

Flynn, 56 Ark. 424, 19 S. W. 961 (1892).

*Illinois.*—Ohio & Miss. R. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291 (1858).

*New York.*—See Jetter v. New York & H. R. R. Co., 2 Abb. 458 (1865).

*Vermont.*—Kimball v. Rutland & B. R. R. Co., 26 Vt. 247, 62 Am. Dec. 567 (1854).

[1] *United States.*—Hannibal R. R. Co. v. Swift, 12 Wall. 262, 20 L. ed. 423 (1870).

*Illinois.*—Peoria & P. Union Ry. Co. v. United States Rolling Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348 (1891).

*Nebraska.*—See Chicago, B. & Q. R. R. Co. v. Curtis, 51 Neb. 442, 71 N. W. 42 (1897).

*New Jersey.*—New Jersey R. R. & Transp. Co. v. Pennsylvania I R. Co., 27 N. J. L. 100 (1858).

*Georgia.*—East Tennessee & G R. R. Co. v. Whittle, 27 Ga. 535, 7 Am. Dec. 741 (1859).

*New York.*—Mallory v. Tioga I R. Co., 39 Barbour, 488 (1862).

[2] See Vermont & M. R. R. C v. Fitchburg R. R. Co., 14 All (Mass), 462, 92 Am. Dec. 7 (1867).

[3] See North British Ry. Co. Caledonian Ry. Co., 3 Ry. & C. T Cas. 273 (1878).

[4] *United States.*—Bank of Ke tucky v. Adams Exp. Co., 93 U. 174, 23 L. ed. 872 (1876); Missou K. & T. Ry. Co. v. Dinsmore, 1 U. S. 30 (1882), 27 L. ed. 640, Sup. Ct. 9 (1884); The Expre Cases, 117 U. S. 1, 29 L. ed. 791, Sup. Ct. 628 (1886); Southern Ex

private carrier, instead of as a common carrier, in carrying goods for an express company under their special agreement. So as the government keeps possession of the mails throughout their transit, the transportation of them is not carriage.[1] But there is another possibility as

Co. v. St. Louis, I. M. & S. Ry. Co., 3 McCreary, 872, 10 Fed. 210 (1882).

*Alabama.*—Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140 (1870); Southern Express Co. v. Hess, 53 Ala. 19 (1875).

*Colorado.*—Merchants' Despatch & Transp. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757 (1877).

*District of Columbia.*—Galt v. Adams Express Co., MacArthur & M. 124, 48 Am. Rep. 742 (1879).

*Florida.*—Southern Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107 (1880).

*Georgia.*—Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783 (1867).

*Illinois.*—Boscowitz v. Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191 (1879).

*Indiana.*—American Express Co. v. Hockett, 30 Ind. 250, 95 Am. Dec. 691 (1868).

*Kansas.*—Adams Express Co. v. McConell, 27 Kan. 238 (1882).

*Massachusetts.*—Buckland v. Adams Express Co., 97 Mass. 124, 93 Am. Dec. 68 (1867).

*Michigan.*—United States Express Co. v. Root, 47 Mich. 231, 10 N. W. 351 (1881).

*Minnesota.*—Christenson v. American Express Co., 15 Minn. 270, 2 Am. Rep. 122 (1870).

*Missouri.*—Kirby v. Adams Express Co., 2 Mo. App. 369 (1876).

*New York.*—Belger v. Dinsmore, 51 N.Y. 166, 10 Am. Rep. 575 (1872).

*Ohio.*—American Express Co. v. Smith, 33 Ohio St. 511, 31 Am. Rep. 561 (1878).

*Oregon.*—Bennett v. Northern Pac. Exp. Co., 12 Oreg. 49, 6 Pac. 160 (1885).

*Pennsylvania.*—Grogan v. Adams Express Co., 114 Pa. St. 523, 7 Atl. 134, 60 Am. Rep. 360 (1886); Union Express Co. v. Ohleman, 92 Pa. St. 323 (1879).

*South Carolina.*—Stadhecker v. Combs, 9 Rich. Law, 193 (1856).

*Tennessee.*—Southern Express Co. v. Wormack, 1 Heisk. 256 (1870).

*Texas.*—Pacific Express Co. v. Darnell, 62 Texas, 639 (1884).

*Vermont.*—Hadd v. United States & Canada Express Co., 52 Vt. 335, 36 Am. Rep. 757 (1880).

*Wisconsin.*—Wells v. American Express Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695 (1882).

[1] *United States.*—Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 117 Fed. 434, 65 L. R. A. 397, 54 C. C. A. 608 (1902).

*Alabama.*—Central Railroad & Banking Co. v. Lampley, 76 Ala. 357, 52 Am. Rep. 334 (1884).

*Iowa.*—Boston Ins. Co. v. Chicago, R. I. & P. Ry. Co., 118 Ia. 423, 92 N. W. 88, 59 L. R. A. 796 (1902).

the case of sleeping car service shows. There not only i the sleeping car company in direct relations with its pub lic and liable for any default to it, but the railroad com pany must also answer to the passengers it is thus carry ing. The result is a cumulative liability, both the railroa company and the car company being liable to an injure patron.[1]

### *Topic D. Special Arrangements with Particular Classes*

### § 777. Mail clerks.

In the majority of cases mail clerks although travelin in the mail cars are said to be passengers; for it is pointe out that their transportation is included in the sum pai the railroad by the government. It is, however, generall recognized that as they are necessarily carried in a differen car from ordinary passengers, to extent to which it i dangerous to travel in such a car instead of the ordinar passenger car the mail agent takes the risk of injury; bu in all other respects it is still insisted that the agent has th rights of an ordinary passenger.[2] Notwithstanding thi

[1] *United States.* — Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141 (1880).

*Louisiana.*—Airey v. Pullman Palace Car Co., 50 La. Ann. 648, 23, So. 512 (1898).

*New York.*—Dwinelle v. New York Central & H. R. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611 (1890).

*Ohio.*—Railroad Co. v. Walrath, 38 Ohio St. 461, 43 Am. Rep. 433 (1882).

*South Carolina.*—Taber v. Seaboard Air Line Ry. Co., 84 S. C. 291, 66 S. E. 292 (1909).

[2] The propositions advanced in this first paragraph are supporte by the following cases amon others:

*United States.*—Gleeson v. Vir ginia Midland R. R. Co., 140 U. S 435, 35 L. ed. 458, 11 Sup. Ct. 85 (1891); Southern Pac. Co. v. Cavin 144 Fed. 348, 75 C. C. A. 35 (1906); Arrowsmith v. Nashville D. Ry. Co. (C. C.), 57 Fed. 16 (1893).

*Alabama.*—Southern Ry. Co. v Harrington (Ala.), 52 So. 57 (1910)

*District of Columbia.*—Chesapeake & O. Ry. Co. v. Patton, 2 App. D. C. 113 (1904).

*Illinois.*—Barker v. Chicago, P

general language it should be considered that mail clerks are to be carried in a special car, under special circumstances; and they are not strictly travelers, since they desire merely to do business on the railroad train. The carrier is not bound to receive them as passengers, and it is therefore held in several cases that it may make such arrangements as it pleases with regard to terms of carriage and its liability for injury.[1] In other words the mail

& St. L. Ry. Co., 243 Ill. 482, 90 N. E. 1057, 26 L. R. A. (N. S.) 1058 (1909); Wabash Ry. Co. v. Jellison, 124 Ill. App. 652 (1906).

*Indiana.*—Cleveland, C., C. & St. L. Ry. Co. v. Ketcham, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550 (1893); Malott v. Central Trust Co., 168 Ind. 428, 79 N. E. 368, 11 A. & E. Ann. Cas. 879 (1906).

*Kentucky.*—Louisville & N. R. R. Co. v. Kingman, 18 Ky. Law Rep. 82, 35 S. W. 264 (1896).

*Maine.*—Libby v. Maine Cent. R. R. Co., 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812 (1892).

*Maryland.*—Baltimore & Ohio R. R. Co. v. State, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454 (1890).

*Massachusetts.*—Stoddard v. New York, N. H. & H. R. R. Co., 181 Mass. 422, 63 N. E. 927 (1902).

*Minnesota.*—Decker v. Chicago, M. & St. P. Ry. Co., 102 Minn. 99 112 N. W. 901 (1907).

*Missouri.*—Mellor v. Missouri Pac. Ry. Co., 105 Mo. 455, 14 S. W. 758, 10 L. R. 36 (1891).

*Montana.*—Hoskins v. Northern Pac. Ry. Co., 39 Mont. 394, 102 Pac. 988 (1909).

*New York.*—Seybolt v. New York, L. E. & W. R. R. Co., 95 N. Y. 562, 47 Am. Rep. 75 (1884).

*North Carolina.*—Grant v. Raleigh & Gaston R. R. Co., 108 N. C. 462, 13 S. E. 209 (1891).

*South Carolina.*—Hammond v. North Eastern R. R. Co., 6 S. C. 130, 24 Am. Rep. 467 (1874).

*Tennessee.*—Illinois Cent. Ry. Co. v. Porter, 117 Tenn. 13, 94 S. W. 666, 10 A. & E. Ann. Cas. 789 (1908).

*Texas.*—International & G. N. Ry. Co. v. Davis, 17 Tex. Civ. App. 340, 43 S. W. 540 (1897); Houston & T. C. Ry. Co. v. McCullough, 22 Tex. Civ. App. 208, 55 S. W. 392 (1899); Sproule v. St. Louis & S. F. Ry. Co. (Tex. Civ. App.), 91 S. W. 657 (1906).

*Virginia.*—Norfolk & W. R. R. Co. v. Shott, 92 Va. 34, 22 S. E. 811 (1895).

*England.*—Collett v. London & N. W. Ry. Co., 16 Q. B. 984 (1851).

[1] The propositions advanced in this paragraph are supported by the following cases, among others:

*United States.*—Baltimore & Ohio S. Ry. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 56, 20 Sup. Ct. 385 (1899).

*Indiana.*—Louisville, N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, 44

clerks may be taken upon a public or a private basis, a the facts may show.

**§ 778. Express messengers.**

The same things are true of an express messenger. ] he is being carried by the railroad in a special car, unde the contract with the express company, he is usually hel to be a passenger, except so far as he accepts the risk c being carried in an express car.[1] But by the weight c authority he also will be affected by a contract providin that the company shall not be liable to him as a carrier c passengers would be,[2] although there are some cases t

N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348 (1896).

*Massachusetts.* — Bates v. Old Colony R. R. Co., 147 Mass. 255, 17 N. E. 633 (1888).

*Ohio.*—But see Pennsylvania Co. v. Woodworth, 26 Ohio St. 585 (1875).

*Pennsylvania.*—Pennsylvania R. R. Co. v. Price, 96 Pa. St. 256 (1880).

*Wisconsin.*—But see Chamberlain v. Milwaukee & Miss. R. R. Co., 11 Wis. 238 (1860).

But see Illinois Central R. R. Co. v. Crudup, 63 Miss. 291 (1885).

And see Schuyler v. Southern Pacific Ry. Co. (Utah), 109 Pac. 458 (1910).

[1] The foregoing statements are supported by the following cases:

*Arkansas.*—Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597 (1892).

*California.*—Yeomans v. Contra C. S. Nav. Co., 44 Cal. 71 (1872).

*Indiana.*—Cleveland, C., C. & St. L. Ry. Co. v. Ketcham, 133 Ind. 346, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550 (1893).

*Kansas.*—Union Pacific Ry. C v. Nichols, 8 Kan. 505, 12 An Rep. 475 (1871).

*Kentucky.*—Davis v. Chesapeak & O. Ry. Co., 29 Ky. Law Rep. 5 92 S. W. 339, 5 L. R. A. (N. S.) 45 (1906).

*Missouri.*—Jones v. St. Lou Southwestern Ry. Co., 125 Mo. 66 28 S. W. 883, 26 L. R. A. 718, 4 Am. St. Rep. 514 (1894).

*New York.*—Blair v. Erie R Co., 66 N. Y. 313, 23 Am. Rep. 5 (1876).

*Ohio.* — Pennsylvania Co. Woodworth, 26 Ohio St. 585 (1875

*Texas.*—Gulf, C. & S. F. Ry. C v. Wilson, 79 Tex. 371, 15 S. W 280, 11 L. R. A. 486, 23 Am. S Rep. 345 (1891).

*Wisconsin.*—Peterson v. Chicag & Northwestern Ry. Co., 119 Wi 197, 96 N. W. 532, 100 Am. St. Re 897 (1903).

[2] *United States.*—Chicago & N W. Ry. Co. v. O'Brien, 132 Fe 593, 67 C. C. A. 421 (1904).

*Delaware.*—Perry v. Philadelphi B. & W. R. R. Co. (Del. Supr.), 7 Atl. 725 (1910).

the contrary that deserve attention.[1] The conditions of the transportation are as before peculiar, and the railroad may therefore insist upon making it a private arrangement with special terms. Some of these cases insist that the individual messenger must be brought into this understanding by contract to that effect with his employers,[2] but others say that he is affected by knowledge of the agreement.[3] These problems are not worked out; and it seems to the writer that they will never be satisfactorily worked out until the attempt to explain them upon the basis of contracting is given up in favor of the theory of the character of the acceptance.

**§ 779. Employés of car companies.**

The same law governs the liability of railroad companies to the employés of car companies on duty. Such employés are held presumptively passengers,[4] compensation for their transportation being included in the whole

*Illinois.*—Blank v. Illinois Cent. R. R. Co., 182 Ill. 332, 55 N. E. 332 (1899).

*Indiana.*—Louisville N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348 (1896).

*Massachusetts.*—Bates v. Old Colony R. R. Co., 147 Mass. 255, 17 N. E. 633 (1888).

*New Jersey.*—Dodd v. Central R. R. of N. J. (N. J. L.), 76 Atl. 544 (1910).

*Vermont.*—Robinson v. St. Johnsbury & L. C. Ry. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. (N. S.) 1249 (1907).

[1] See Davis v. Chesapeake & O. Ry. Co., 29 Ky. Law Rep. 53, 92 S. W. 339, 5 L. R. A. (N. S.) 458 (1906).

[2] *United States.*—Chamberlain v. Pierson, 87 Fed. 420, 59 U. S. App. 55, 31 C. C. A. 157 (1898).

*New York.*—Brewer v. New York, L. E. & W. R. R. Co., 124 N. Y. 59, 26 N. E. 324, 21 Am. St. Rep. 647, 47 Am. & Eng. R. Cas. 485 (1891).

[3] *Illinois.*—Blank v. Illinois Cent. R. R. Co., 182 Ill. 332, 55 N. E. 332 (1899).

*Indiana.*—Pittsburg, C., C. & St. L. Ry. Co. v. Mahoney, 148 Ind. 196, 47 N. E. 917, 62 Am. St. Rep. 503, 40 L. R. A. 101 (1897).

[4] See to this effect, among others:

*United States.*—McDermon v. Southern Pacific Co., 122 Fed. 669 (1903).

*Illinois.*—Blank v. Illinois Cent. R. R. Co., 182 Ill. 332, 55 N. E. 332 (1899).

transaction. But here again the cases allow the railroad in making arrangements to have sleeping car facilities for the public, to obtain an indemnity contract from the sleeping car company and an exemption contract from the employés of the sleeping car company.[1]

**§ 780. Owners accompanying their shipments.**

Where public duty is involved no special arrangement can be insisted upon. The established basis upon which cattle shipments are made being that representatives or the owners may accompany them, such drovers are properly considered passengers, their fare being included in the rate. Therefore any contract that provides for exemption of the railroad from liability with respect to them is void. The most that the peculiar method of traveling results in is that they must submit to whatever special disabilities that there may be necessarily incident to the undertaking.

[1] See to this effect, among others:

*Illinois.*—Chicago, R. I. & P. Ry. Co. v. Hamler, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187 (1905).

*Indiana.*—Russell v. Pittsburg, C., C. & St. L. Ry. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214 (1901).

The right to obtain such an indemnity contract results from the fact that a railroad company is under no legal duty to receive a sleeping car from a Pullman company, nor its employé thereon. Russell v. Pittsburg, C., C. & St. L. Ry. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214 (1901).

[2] These general propositions may be found in the following cases, among others:

*United States.*—Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 2 L. ed. 627 (1873); Delaware, L. & W. R. R. Co. v. Ashley, 67 Fed 209, 28 U. S. App. 375, 14 C. C. A 368 (1895).

*Arkansas.*—Little Rock & Ft. S Ry. Co. v. Miles, 40 Ark. 298, 4 Am. Rep. 10 (1883).

*Delaware.*—Flinn v. Philadelphi W. & B. R. R. Co., 1 Houst. (Del. 469 (1857).

*Illinois.*—Illinois Cent. R. R. Co v. Anderson, 184 Ill. 294, 56 N. E 331 (1900).

*Indiana.*—Louisville N. A. & C R. R. Co. v. Taylor, 126 Ind. 126 25 N. E. 869 (1890).

*Kentucky.*—Louisville & N. R. R Co. v. Bell, 100 Ky. 203, 38 S. W 3, 18 Ky. L. Rep. 735 (1896).

*Minnesota.* — Olson v. St. Pau & D. R. R. Co., 45 Minn. 536, 4

And similarly where by an arrangement between a lumber company and a railroad company it was agreed that the lumber company's employés should be carried to and from work, an employé riding to work on a logging train was entitled to the rights of a passenger.[1]

**§ 781. Employés of contracting shippers.**

There are some extreme cases where the fundamental principle in all this is said to be that the carrier cannot make stipulations against liability for injuries to persons being transported in connection with matters as to which he owes a duty, obliging him to permit persons to travel in the way described as a matter of right.[2] Thus in a late New Hampshire case,[3] it was held that the railroad could not by special contract relieve itself of its liabilities to employés of milk contractors traveling in their milk cars. The court pointing out that in regard to such trans-

N. W. 445, 22 Am. St. Rep. 749 (1891).

*Missouri.*—Carroll v. Missouri Pac. Ry. Co., 88 Mo. 239, 57 Am. Rep. 382 (1885).

*Nebraska.* — Missouri Pac. Ry. Co. v. Tietken, 49 Neb. 130, 68 N. W. 336, 59 Am. St. Rep. 526 (1896).

*Ohio.*—Cleveland P. & A. R. R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362 (1869).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. Cole, 8 Tex. Civ. App. 635, 28 S. W. 391 (1894).

*Wisconsin.*—Lawson v. Chicago, St. P., M. & O. Ry. Co., 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634 (1885).

But see:

*New York.*—Poucher v. New York Cent. R. R. Co., 49 N. Y. 263, 10 Am. Rep. 364 (1872).

*South Dakota.*—Meuer v. Chicago M. & St. P. Ry. Co., 5 S. D. 568, 59 N. W. 945, 25 L. R. A. 81, 45 Am. St. Rep. 898 (1894).

[1] Trinity Val. Ry. Co. v. Stewart (Tex. Civ. App.), 62 S. W. 1085 (1901).

[2] See the uncompromising reasoning in such cases as:

*United States.*—Voight v. Baltimore, O. & S. W. Ry. Co., 79 Fed. 561 (1897).

*Kentucky.*—Davis v. Chesapeake & O. Ry. Co., 122 Ky. 528, 92 S. W. 339, 5 L. R. A. (N. S.) 458 (1906).

*Minnesota.*—Starr v. Gt. Northern Ry. Co., 67 Minn. 18, 69 N. W. 632 (1896).

*Ohio.*—Pennsylvania Ry. Co. v. Woodworth, 26 Ohio St. 585 (1875).

[3] *New Hampshire.*—Baker v. Boston & M. R. R. Co., 74 N. H. 100, 65 Atl. 386 (1906).

portation the company owes the special duty to accommodate this peculiar service, which means special cars properly equipped.

**§ 782. Concessionaires in general.**

On the other hand, unless such a duty can be made to appear there is no obligation to receive the persons concerned upon a passenger basis and they may therefore be properly taken upon a special basis with limited liability. Thus a street railway would not in any case owe a duty similar to that which it owes to passengers, to newsboys whom it permits to jump on and off of its cars while in motion, since the conditions are so different from those under which passengers are carried.[1] And generally the contract with a train boy permitting him to do business on board would not be upon the basis of his acceptance as a passenger; at all events as the railroad owes no duty to accept him, it may stipulate that it shall not be liable as it would to a passenger.[2]

**§ 783. Employés while on duty.**

The question has been much discussed whether a servant of the company who is being carried gratuitously is entitled to be regarded as a passenger. If the carriage is directly in connection with his work he is really engaged while being carried in his employment and his relation to the carrier is that of servant and certainly not that of a passenger; as where a workman on a construction or a gravel train is taken from place to place on the road, as

[1] *Illinois.*—Chicago, R. I. & Pac. R. R. Co., v. Moran, 117 Ill. App. 42 (1904).

*Missouri.*—Padgitt v. Moll. & Citizens' Ry. Co., 149 Mo. 143, 60 S. W. 121, 52 L. R. A. 854, 81 Am. St. Rep. 347 (1900).

[2] *Connecticut.*—Griswold, Admr. v. New York, & N. E. R. R. Co. 53 Conn. 371, 4 Atl. 261, 55 Am. Rep 115 (1885).

*Louisiana.*—Higgins v. New Orleans, M. & C. R. R. Co., 28 La Ann. 133 (1876).

his services are needed.[1] If he is not actually working at his employment, but is being carried to or from the place of employment, by agreement with the company, as an assistance to his work, he would seem equally to be engaged in his employment, and not to be a passenger.[2]

[1] *Georgia.*—Travelers' Ins. Co. v. Austin, 116 Ga. 264, 42 S. E. 522, 59 L. R. A. 107, 94 Am. St. Rep. 125 (1902).

*Indiana.*—Evansville & Richmond R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092 (1893).

*Louisiana.*—Dobson v. New Orleans & W. R. R. Co., 52 La. Ann. 1127, 27 So. 670 (1900).

*Massachusetts.* — Gillshannon v. Stony Brook R. R. Corp., 10 Cush. 228 (1852); Kilduff v. Boston Elev. Ry. Co., 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873 (1907), employé being brought from work in special cars, not passengers.

*New York.*—Streets v. Grand Trunk Ry. Co., 178 N. Y. 553, 76 App. Div. 480, aff'd 70 N. E. 1109 (1904).

*Pennsylvania.*—Benignia v. Pennsylvania R. R. Co., 197 Pa. 384, 47 Atl. 359 (1900).

Though not a passenger, yet being rightfully on the train, he can have damages for an injury caused by actual negligence imputable to the carrier, unless he is barred by the fact that the negligence was that of a fellow servant.

*Indiana.*—Evansville & R. R. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511 (1893).

*Louisiana.*—Dobson v. New Orleans & W. R. R. Co., 52 La. Ann. 1127, 27 So. 670 (1900).

*Texas.*—Texas & P. Ry. Co. v. Scott, 64 Tex. 549 (1885).

*West Virginia.* — Sanderson v. Panther L. Co., 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841 (1901).

[2] *Illinois.*—Chicago T. T. R. R. Co. v. O'Donnell, 213 Ill. 545, 72 N. E. 1133 (1905).

*Indiana.*—Columbus & I. Cent. Ry. Co. v. Arnold, 31 Ind. 174, 99 Am. Dec. 615 (1869).

*Massachusetts.*—Kilduff v. Boston Elev. Ry. Co., 195 Mass. 307, 81 N. E. 191, 9 L. R. A. (N. S.) 873 (1907).

*New York.*—Ross v. New York Cent. & H. R. R. R. Co., 74 N. Y. 617 (1878).

*North Carolina.* — Wright v. Northampton & H. R. R. Co., 122 N. C. 852, 29 S. E. 100 (1898).

*Ohio.*—Manville v. Cleveland & T. R. R. Co., 11 Ohio St. 417 (1860).

*Rhode Island.*—Ionnone v. New York, N. H. & H. R. R. Co., 21 R. I. 452, 44 Atl. 592, 79 Am. St. Rep. 812 (1899).

*Wisconsin.*—Ewald v. Chicago & N. W. Ry. Co., 70 Wis. 420, 36 N. W. 12, 5 Am. St. Rep. 178 (1888).

*Tennessee.*—Transit Co. v. Venable, 105 Tenn. 460, 58 S. W. 861, 51 L. R. A. 866 (1900).

*Texas.*—Johnson v. Texas Cent. R. R. Co. (Tex. Civ. App.), 93 S. W. 433 (1906).

**§ 784. Employés receiving independent service.**

If, however, he receives in part compensation for his services the right to travel as passengers do, then in so traveling he is to be regarded as in all respects a passenger. To cite a late example of this, in Herbert v. Portland Railroad Company,[2] it appeared that one who was employed as greaser, while being transported by his employer to his place of work, was injured by a derailment of the car. It was contended on the ground that he had paid his fare by a ticket given by the company and that he was going to his work that he was not a passenger, but the Maine court held that although the ticket was given him by the company for that ride he had paid for his services. It was part of his wages and delivered to him as such. I

*England.*—Tunney v. Midland Ry. Co., L. R. C. P. 291 (1866).

*Canada.*—May v. Ontario & Q. Ry. Co., 10 Ont. Rep. 70 (1885).

[1] See among many other cases to this effect:

*United States.*—Whitney v. New York, N. H. & H. R. R. Co., 43 C. C. A. 19, 102 Fed. 850, 50 L. R. A. 615 (1900).

*Georgia.*—Carswell v. Macon, D. & S. R. R. Co., 118 Ga. 826, 45 S. E. 695 (1903).

*Indiana.*—Indianapolis Traction & Terminal Co. v. Romans, 40 Ind. App. 184, 79 N. E. 1068 (1907).

*Maryland.* — State v. Western Maryland R. R. Co., 63 Md. 433 (1884).

*Massachusetts.* — Dickinson v. West End. St. Ry. Co., 177 Mass. 363, 59 N. E. 60, 83 Am. Rep. 284, 52 L. R. A. 326 (1901). Employé riding free to dinner is a passenger.

*Oregon.*—Simmons v. Oregon R. R. Co., 41 Oreg. 151, 69 Pac. 440 (1902).

*Pennsylvania.*—McNulty v. Pennsylvania R. R. Co., 182 Pa. 479, 38 Atl. 524, 61 Am. St. Rep. 721, 38 L. R. A. 376 (1897).

*Utah.*—Williams v. Oregon S. L. R. R. Co., 18 Utah, 210, 54 Pac. 991, 72 Am. St. Rep. 777 (1898).

*Washington.*—Peterson v. Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 53 L. R. A. 586 (1900).

Two cases may seem *contra*, but they need not be troublesome. Pennsylvania R. R. Co. v. Books, 57 Pa. 339, 98 Am. Dec. 229 (1868), which seems to hold that a servant riding on an employer's pass is not to be regarded as a passenger under any circumstances, must be considered overruled on that point by Higgins v. Hannibal & S. J. R. R. Co., 36 Mo. 418 (1865), which held that an employé riding free in a baggage car on his own business was not to be regarded as a passenger in the language of a statute giving damages for death.

[2] 103 Me. 315, 69 Atl. 266 (1907).

could make no difference in his status as a passenger whether he paid his fare in cash or in tickets thus earned.

**§ 785. Full liability in gratuitous service.**

A most important point has not been brought forward for discussion as yet. Although not obliged to perform gratuitous service upon the usual terms, the one who is performing the service may assume the usual obligations pertaining to the service. Thus there is no doubt upon the authorities that a person carried gratuitously by a railroad is a passenger, and is entitled to the same care as any passenger.[1] A recent case [2] brings this out clearly.

[1] *United States.*—Philadelphia & R. R. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. ed. 502 (1852); Indianapolis, T. & T. Co. v. Lawson, 74 C. C. A. 630, 143 Fed. 834 (1906).

*Illinois.*—Benner Livery & U. Co. v. Busson, 58 Ill. App. 17 (1894).

*Indiana.*—Gillenwater v. Madison & Ind. R. R. Co., 5 Ind. 339, 61 Am. Dec. 101 (1854); Ohio & Miss. Ry. Co. v. Nickless, 71 Ind. 271 (1880); Russell v. Pittsburgh Ry. Co., 157 Ind. 305, 61 N. E. 678, 87 Am. St. Rep. 214, 55 L. R. A. 253 (1901).

*Iowa.*—Rose v. Des Moines Valley R. R. Co., 39 Ia. 246 (1874).

*Maine.*—Hoar v. Me. Cent. R. R. Co., 70 Me. 65, 35 Am. Rep. 299 (1879).

*Maryland.* — State v. Western Maryland R. R. Co., 63 Md. 433 (1884).

*Massachusetts.*—Todd v. Old Colony R. R. Co., 3 Allen (Mass.), 18, 80 Am. Dec. 49 (1861); Wilton v. Middlesex R. R. Co., 107 Mass. 108, 9 Am. Rep. 11 (1871); Wilton v. Middlesex R. R. Co., 125 Mass. 130 (1878); Littlejohn v. Fitchburg R. R. Co., 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502 (1889); Doyle v. Fitchburg R. R. Co., 162 Mass. 66, 37 N. E. 770, 44 Am. St. Rep. 335, 25 L. R. A. 157 (1894).

*Michigan.*—Flint & Pere M. Ry. Co. v. Weir, 37 Mich. 111, 26 Am. Rep. 499 (1877).

*Minnesota.*—Jacobus v. St. Paul & C. Ry. Co., 20 Minn. 125, 18 Am. Rep. 360 (1873).

*Missouri.*—Lemon v. Chanslor, 68 Mo. 340, 30 Am. Rep. 799 (1878); Buck v. People's St. Ry., E. L. & P. Co., 46 Mo. App. 555 (1891); Dorsey v. Atchison, T. & S. F. Ry. Co., 83 Mo. App. 528 (1900).

*New York.*—Perkins v. N. Y. C. R. R. Co., 24 N. Y. 196, 82 Am.

[2] Indiana Traction & Terminal Co. v. Klentschy, 167 Ind. 598, 79 N. E. Rep. 908 (1907); and see Indianapolis Traction & T. Co. v. Lawson, 143 Fed. 834, 74 C. C. A. 630, 5 L. R. A. (N. S.) 721 (1906).

Plaintiff, a member of a ladies' society, was attending a convention in defendant's city. With other members of the convention she was invited to ride on defendant's cars, and during the progress of the ride a collision occurred between two of the cars by which the plaintiff was injured. It was contended that inasmuch as the members of the convention were riding gratuitously, they did not become passengers so as to impose liability upon defendant company. The court in holding that the company was liable for the injuries sustained, said: "A passenger who is carried gratuitously by a common carrier is as much a passenger as if he were paying full fare, and the mere fact that he is carried gratuitously will not of itself deprive him of his right of action if injured by the negligence of the carrier."

**§ 786. Explicit limitation to private basis.**

It should however be plain that a carrier who is carrying a passenger gratuitously does not owe him the duty owed by a common carrier. Although he is obliged to take care even of a gratuitous passenger, still the obligations of the common carrier do not bind him. The question commonly arises where a passenger riding on a free pass exempts the carrier from liability for injury by negligence. Such an exemption is generally held binding, though in the case of a common carrier it would be void.[1] The rail-

Dec. 282 (1862); Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 17 Am. Rep. 221 (1874).

*Pennsylvania.*—Buffalo, P. & W. R. R. Co. v. O'Hara,* 3 Pennyp. (Pa.) 190, 12 Wkly Note Cas. (Pa.) 473 (1882).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. McGown, 65 Tex. 640 (1886).

*Wisconsin.*—Annas v. Milwaukee & N. R. R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848 (1886); Gabbert v. Hackett, 135 Wis. 86. 115 N. W. 345, 14 L. R. A. (N. S.) 1070 (1908).

[1] *United States.*—Northern Pac. Ry. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. 408 (1904); Boering v. Chesapeake Beach Ry. Co., 193 U. S. 442, 48 L. ed. 742, 24 Sup. Ct. 515 (1903).

*Connecticut.*—Griswold v. New

way company is not truly in such a case a carrier for hire. It only offers its guest the privilege of riding in its coaches without charge if he would assume the risk of negligence. He is not in the power of the company and obliged to accept its terms; they stand on an equal footing. If he desires to hold it to its common law obligations to him as a passenger, he may pay his fare and compel the company to receive and carry him. He freely and voluntarily chooses to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. In some jurisdictions [1] however, it is held that even in the case of a free passenger a limitation of liability for negligence is invalid; but this is more on general grounds of public policy, for it is hardly denied that the carrier is not as to such passenger a mere private carrier.

York & N. E. R. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115 (1885).

*Illinois.*—Toledo W. & W. Ry. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613 (1877).

*Indiana.*—Payne v. Terre Haute & I. Ry. Co., 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472 (1902).

*Maine.*—Rogers v. Kennebec Stb. Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491 (1894).

*Massachusetts.*—Quimby v. Boston & M. R. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846 (1890).

*Montana.*—John v. Northern Pacific Ry. Co. (Mont.), 111 Pac. 632 (1910).

*New Jersey.*—Kinney v. Central R. R. Co., 34 N. J. L. 513, 3 Am. Rep. 265 (1869).

*New York.*—Wells v. New York Cent. R. R. Co., 24 N. Y. 181 (1862).

*Tennessee.*—Marshall v. Nashville R. & Light Co., 118 Tenn. 254, 101 S. W. 419, 9 L. R. A. (N. S.) 1246 (1906).

*Texas.*—Gulf, C. & S. F. Ry. Co. v. McGown, 65 Tex. 640 (1886).

*Washington.*—Muldoon v. Seattle City Ry. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794 (1893).

*Wisconsin.*—Annas v. Milwaukee & N. R. R. Co., 67 Wis. 46, 30 N. W. 282, 58 Am. Rep. 848 (1886).

[1] *Alabama.*—Mobile & O. R. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607 (1868).

*Indiana.*—Indiana C. Ry. Co. v. Mundy, 21 Ind. 48, 83 Am. Dec. 339 (1863).

*Minnesota.*—Jacobus v. St. Paul & C. Ry. Co., 20 Minn. 125, 18 Am. Rep. 360 (1873).

*Missouri.*—Bryan v. Missouri Pac. Ry. Co., 32 Mo. App. 228 (1888).

*Pennsylvania.*—Camden & A. R. R. Co. v. Bausch (Pa. St.), 7 Atl. 731 (1887).

# CHAPTER XXIII

## PROVISION OF ADEQUATE FACILITIES

§ 790. Basis of the duty to supply equipment.

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## § 790. Basis of the duty to supply equipment.

It must be obvious that the provision of adequate facilities in the conduct of the business which has been undertaken is one of the fundamental obligations resting upon those who undertake a public service; for without the recognition of this duty to provide proper facilities the general requirement of service would be idle. It has indeed always been recognized that the public servant must keep his equipment up to the standard of his undertaking; but it must be conceded that until recent times the law had not advanced much beyond this. This is the most obvious phase of this obligation, the requirement that the facilities furnished shall be adequate to complete properly the performance of any service actually undertaken. It is hardly too much to say that originally it was supposed that when the facilities put at the disposal of the public were exhausted the proprietors of the service were excused. But of late years it has been seen that in certain businesses at least one is committed to more than the utilization of the original facilities in the service of the public. Just how far both of these classes of cases may exist without inconsistency is one of the problems of this chapter. But there can be no doubt of the tendency of the times to put as many businesses into the second class as possible. The common law is certainly becoming more exacting as to what constitutes an adequate provi-

sion of facilities. And it must be obvious to all observers of the tendencies of legislation regulating public service that the oversight of facilities is going to be most intimate in the immediate future.

*Topic A. Provision of Proper Facilities*

**§ 791. Profession limited to original facilities.**

According to the original conception of the devotion of property to a public use the obligation was limited to the facilities offered. And indeed there are still several instances in public service, where the original profession still does not contemplate the expansion of the business beyond the original facilities. A carter [1] cannot be compelled to equip himself with a wagon of larger capacity even if business is continually offered him requiring better equipment. It is a sufficient excuse that his cart is too small for the freight offered. A shipowner [2] may hold himself out to the public to carry certain goods of a certain sort for hire. As to the goods he proposes to carry he is a public carrier; but he is under no obligation to provide other ships, because his vessel is inadequate to transport all goods which may be offered to him. Again, an innkeeper who commits himself to public service is not obliged to enlarge his original building. His showing that his house is full is always a defense, no matter how often this may have happened before.[3] So an elevator man performs his whole duty when he devotes his whole structure to the service of the public, reserving none of it for his own purposes.[4] This has been remarked before in this treatise

[1] Tunnel v. Pettijohn, 2 Harr. (Del.) 48 (1835).

[2] Ocean Steamship Co. v. Savannah Locomotive Works & Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265 (1909).

[3] Browne v. Brandt 1 K. B. 696, 71 L. J. K. B. 367, 86 L. T. 625, 50 W. R. 654 (1902).

[4] Hannah v. People, 198 Ill. 77, 64 N. E. 776 (1902).

in connection with the discussion of the primary duty, which in these cases is in reality limited by the original profession to the devotion of the facilities offered to the service of the public. In these particular instances the obligation undertaken being simply to devote given facilities, no further obligation in respect to facilities results. But in the most important modern services the profession made is to render a given service to the community in general; and a proper consequence of this undertaking is the obligation to provide adequate facilities to perform the service promised.

**§ 792. Adherence to the original scope.**

These cases under discussion are not exceptional instances but extreme illustrations of the rule (difficult though it may be to apply) that within the scope of the original commitment the public servant must provide all the facilities which his business requires, but outside his public profession he is not bound to go at all, no matter how much the community may need his services. Thus it has been common law that a railroad is not obliged to equip itself with cars to send beyond its established route, no matter how much the service requested is desired by its shippers.[1] And as a carrier need never equip itself to perform any service which is outside its public profession, it need not, for example, carry unusual freights which require special equipment.[2] Thus a railroad need not

[1] *Indiana.*—Pittsburg, C. & St. L. Ry. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682 (1878).

*Illinois.*—People v. Chicago & A. R. R. Co., 55 Ill. 95, 8 Am. Rep. 631 (1870).

*Kentucky.*—Pittsburg, C., C. & St. L. Ry. Co. v. Viers, 113 Ky. 526, 68 S. W. 469 (1902).

*Massachusetts.*—Pitlock v. Wells, Fargo & Co., 109 Mass. 452 (1872).

*Pennsylvania.*—See Gordon v. Hutchinson, 1 W. & S. 285, 37 Am. Dec. 464 (1841).

*Texas.*—Houston & T. C. Ry. Co. v. Buchanan, 42 Tex. Civ. App. 620, 94 S. W. 199 (1906).

[2] A variety of cases on this point are subjoined:

even provide equipment to carry passengers unless it undertakes that service upon a public basis.[1] The same principles should apply throughout public service. It is highly improbable that any fundamental change can be forced upon a company against its will. A fuel gas company cannot be compelled to supply gas for illumination any more than it could be compelled to provide electricity

*United States.*—Kuter v. Michigan Central R. R. Co., 1 Biss. 35 (1853).

*California.*—Pfister v. Central Pacific R. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404 (1886).

*Delaware.*—Tunnel v. Pettijohn, 2 Harr. (Del.) 48 (1835).

*Georgia.*—Ocean Steamship Co. v. Savannah, L. W. & S. Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. 867, 127 Am. St. Rep. 265 (1909).

*Indiana.*—Cleveland, C., C. & St. L. Ry. Co. v. Henry, 170 Ind. 94, 83 N. E. 710 (1908).

*Louisiana.*—Mechanics' & T. Bk. v. Gordon, 5 La. Ann. 604 (1850).

*Massachusetts.*—Robertson v. Old Colony R. R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482 (1892).

*Michigan.*—Coup v. Wabash, St. L. & P. Ry. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374 (1885).

*Missouri.*—Chouteau v. Steamboat St. Anthony, 16 Mo. 216 (1852).

*New York.*—Bouker v. Long Island R. R. Co., 89 Hun (N. Y.), 202, 35 N. Y. Supp. 23 (1895).

*New York.*—People v. Babcock, 16 Hun, 313 (1878).

*North Carolina.*—Pender v. Robbins, 6 Jones' Law, 207 (1858).

*Pennsylvania.*—Forepaugh v. Delaware, L. & W. R. R. Co., 128 Pa St. 217, 18 Atl. 503, 5 L. R. A. 508 15 Am. St. Rep. 572 (1889).

*England.*—In re Oxlade v. N. E Ry. Co., 15 C. B. (N. S.) 680 (1864)

*Canada.*—Leonard v. American Express Co., 26 Upp. Can. (Q. B.) 533 (1867).

[1] A railroad may confine its business to the handling of freight exclusively. Wiggins Ferry Co. v. East St. Louis Ry. Co., 107 Ill. 450 (1883).

It may even limit its business to the carriage of freight in the original cars. United States v. Sioux City Stock Yards Co., 162 Fed. 556 (1908).

A railroad doing both freight and passenger business may give up its passenger trains and do freight business exclusively. Commonwealth v. Fitchburg R. R. Co., 12 Gray, 180 (1858).

A railroad may do passenger business upon a public basis while doing freight business upon a private basis. Edgar Lumber Co. v. Cornie Stave Co. (Ark.), 130 S. W. 452 (1910).

[2] Nairin v. Kentucky Heating Co., 27 Ky. Law Rep. 551, 86 S. W. 676 (1900). And see People v. Los Angeles Independent Gas Co., 150 Cal. 557, 89 Pac. 108 (1907).

And in general it should be pointed out that the obligation to provide facilities arises from the obligation to render service.

**§ 793. Proper equipment must be provided.**

It is well agreed, however, that all engaged in public service are held to a high degree of responsibility in respect to the facilities furnished, although of course their liability is not absolute. Sometimes this duty is underrated; more often it is overstated. One of the fairest statements that the writer has noted is in a recent Florida case [1] where the court said: "In determining whether or not the road-bed, track, rolling stock and other equipment of a common carrier railroad corporation is reasonably sufficient, and is being maintained and operated in a reasonably safe and adequate condition, and is being managed for the proper rendering of the public service that the corporation has undertaken to perform, the conditions under which the service is being rendered, the character and extent of the service, its reasonable requirements, and the means, facilities, and methods best suited to such service in common use, will be considered by the court, together with any other material and pertinent matters available." [2]

**§ 794. Ultimate responsibility for proper equipment.**

The proprietors of the service are themselves responsible for the proper performance of the service they have professed. They must therefore see to it that they have proper equipment to render the service which they have undertaken. If they have their facilities constructed by

[1] State ex rel. Ellis v. Atlantic C. L. Ry. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A. (N. S.) 330 (1907).

[2] Thus a railroad which is engaged in carrying passengers as well as freight must by these general principles run separate passenger trains. People ex rel. v. St. Louis, A. & T. H. R. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656 (1898).

independent concerns they cannot escape this person liability even by making a careful choice of contractor for they remain liable themselves for failure in their unde taking if there has been negligence in the constructio Thus if a railroad bridge is built for a railroad by a rep table bridge works so negligently that an accident resul the railroad is liable.[1] Upon similar principles if th utilize the equipment of another concern they are liab if it proves not to be safe although they had no reason believe that it was not. Thus a railroad hauling the ca of another road is liable for any accident occurring l any defect in the cars even when its own inspection show none.[2] This general duty to provide facilities is one whi cannot be delegated. A railroad cannot by having i passengers carried in sleeping cars belonging to an ind pendent company escape ultimate liability for the safe of the equipment provided.[3] Nor can the proprietc escape personal liability for failure to provide sufficie facilities by contracting with another concern to provi them. Thus a railroad which is getting all its freight ca of a certain class from an outside source cannot excu its failure to supply cars demanded by its customers l showing that the parties who had contracted to supp them are in default.[4]

[1] See, for one example, Louisville, N. A. & C. Ry. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 3 L. R. A. 434, 10 Am. St. Rep. 60 (1888).

[2] See, for one example, New York, P. & N. R. R. Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 81 Am. St. Rep. 722, 49 L. R. A. 462 (1900).

[3] See, for one example, Pennsylvania Company v. Roy, 102 U. S. 451, 26 L. ed. 141 (1880).

[4] See, for one example, Missouri & N. A. R. Co. v. Sneed, 85 Ark. 293, 107 S. W. 1182 (1908).

Some cases go so far as to s that the shipper is not necessar estopped by declining to take a n car in place of defective one fr asserting liability for dama caused by defects. See Texas & Ry. Co. v. Townsend (Tex. C App.), 106 S. W. 760 (1907), a Cleveland, C. & St. L. Ry. Co. Louisville Tin. & S. Co. (Ky.), 1 S. W. 358 (1908).

For the railway must furnish safe car. Even if shipper sees it u safe some cases hold that he m

**§ 795. Improvement of present facilities.**

It is not enough to maintain the original equipment at its former standard. It may be said in general that one who is committed to the conduct of a public business must keep his facilities up to the demands of the times. Thus it has been intimated that those who are chargeable with maintaining a bridge for public use are not limited in their duty to the previous business use of the structure.[1] Likewise it was held in a recent case that where the original ordinance under which a telephone company was operating prohibited it from increasing to its subscribers the telephone rates then established, the telephone company was not thereafter entitled to limit its services at the rates so fixed to the original appliances (which had become to a certain extent obsolete), and to charge higher rates for improved equipment.[2] On the other hand, a public service company is not obliged to make improvements in advance of the demonstration of their practical necessity, and certainly it is not obliged to adopt improvements which are still in an experimental stage.[3] Thus by the general rule a railroad has discharged its duty to its passengers in respect to its cars and trains when it has supplied the best equipment that a highly prudent person would have supplied in the same business in the then known condition of the art and the particular business.[4] It is an interest-

hold the carrier unless he agrees. See Railroad Company v. Pratt, 22 Wall. 123, 22 L. ed. 827 (1874), and St. Louis, I. M. & So. Ry. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802 (1905).

[1] *Nebraska.*—Seyfer v. Otoe County, 66 Neb. 566, 92 N. W. 756 (1902).

*Minnesota.*—Anderson v. St. Cloud, 79 Minn. 88, 81 N. W. 746 (1900).

[2] *Illinois.*—People v. Chicago Telephone Co., 220 Ill. 238, 77 N. E. 245 (1906).

*Indiana.*—Johnson v. The State, 113 Ind. 143, 15 N. E. 215 (1887).

[3] *Indiana.*—Indianapolis & C. R. R. Co. v. Rutherford, 29 Ind. 82, 92 Am. Dec. 336 (1867).

*New York.*—Steinweg v. Erie Ry. Co., 43 N. Y. 123, 3 Am. Rep. 673 (1870).

[4] *United States.*—Ozanne v. Illi-

ing speculation whether the railroads may ultimately obliged by this principle to equip themselves with electi motive power. And one wonders whether a traction coi pany could be compelled to construct a subway.

**§ 796. Provision of special equipment.**

In a diversified business, such as common carriage, special equipment of various sorts must often be provide In the case of the railroads very different cars of cou are requisite for the transfer of passengers and of freigl And although many kinds of freight may be transport in open cars with safety, more kinds require box ca But in the conduct of a modern railroad far more faciliti than these simpler forms have been found to be necessa Thus for the transportation of many perishable food stuf such as butter and fruit, refrigerator cars have been fou to be indispensable; and it is generally held in mode cases that these improved cars are imperatively demand for the proper transportation of perishable articles.[1] T

nois Cent. R. R. Co., 151 Fed. 900 (1907).

*Mississippi.*—Natchez & Jackson R. R. Co. v. McNeil, 61 Miss. 434 (1884).

[1] *United States.*—Atlantic C. L. Ry. Co. v. Geraty, 166 Fed. 10, 91 C. C. A. 602, 20 L. R. A. (N. S.) 310 (1908).

*Arkansas.*—St. Louis, I. M. & S. Ry. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317 (1907).

*Colorado.*—Merchants' Desp. & Transp. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757 (1877).

*Illinois.*—Chicago & Alton R. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382 (1895).

*Iowa.*—Beard v. St. L., Alton & T. H. Ry. Co., 79 Ia. 527, 44 N. 803 (1890).

*Michigan.*—See Johnson v. ledo, S. & M. Ry. Co., 133 Mi 596, 95 N. W. 724, 103 Am. Rep. 464 (1903).

*Minnesota.* — Calender - Vanc hoof Co. v. Chicago, B. & Q. R. Co., 99 Minn. 295, 109 N. W. (1906).

*Missouri.*—See Udell v. Illin C. Ry. Co., 13 Mo. App. 254 (18

*New Hampshire.*—Baker v. B ton & M. R. R. Co., 74 N. H. 1 65 Atl. 386, 124 Am. St. Rep. (1906).

*New York.*—Steinweg v. Erie Co., 43 N. Y. 123, 3 Am. Rep. (1870).

*South Carolina.*—Mathis v. Sou

same law, by reason of the same necessity, applies to the provision of ventilator cars for those commodities which would be injured by transportation in closed cars.[1] As soon as the railways begin the transportation of live stock upon a large scale, as part of their regular business, the provision of special stock cars becomes necessary.[2] And so where a railroad runs through a district shipping large quantities of oil it should, it seems, equip itself with tank cars to meet the commercial necessity of shipment in bulk.[3] These cases would seem to justify the generaliza-

ern Ry. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824 (1902).

*Virginia.*—New York, P. & N. R. R. Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 81 Am. St. Rep. 722, 49 L. R. A. 462 (1900).

*Wisconsin.*—Lamb v. Chicago, M. & St. P. Ry. Co., 101 Wis. 138, 76 N. W. 1123 (1898).

[1] *New York.*—See Tucker v. Pennsylvania Ry. Co., 12 N. Y. Misc. 117, 33 N. Y. Supp. 93 (1895).

*North Carolina.*—Forrester v. Southern Ry. Co., 147 N. C. 553, 18 L. R. A. (N. S.) 508, 61 S. E. 524 (1908).

*Pennsylvania.*—See Davenport v. Pennsylvania R. R. Co., 173 Pa. St. 398, 34 Atl. 59 (1896).

*Wisconsin.*—Densmore Commission Co. v. Duluth, S. S. & A. Ry. Co., 101 Wis. 563, 77 N. W. 904 (1899).

[2] *Arkansas.*—St. Louis, I. M. & S. Ry. Co. v. Marshall, 74 Ark. 597, 86 S. W. 802 (1905).

*Kansas.*—Kansas Pacific R. R. Co. v. Nichols, K. & Co., 9 Kan. 235, 12 Am. Rep. 494 (1872).

*Maine.*—Sager v. Portsmouth, S. & P. & E. R. Co., 31 Me. 228, 50 Am. Dec. 659 (1850).

*Maryland.*—Di Giorgio I. & S. S. Co. v. Pennsylvania R. R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108 (1906).

*Missouri.*—Emerson v. St. Louis & H. Ry. Co., 111 Mo. 161, 19 S. W. 1113 (1892).

*Nebraska.*—Chicago, B. & Q. R. R. Co. v. Williams, 61 Neb. 608, 85 N. W. 832, 55 L. R. A. 289 (1901).

*South Dakota.*—Berry v. Chicago, M. & St. P. Ry. Co. (S. D.), 124 N. W. 859 (1910).

*Texas.*—Texas & P. Ry. Co. v. Barrow (Tex. Civ. App.), 77 S. W. 643 (1903).

[3] *United States.*—Western N. Y. & P. Ry. Co. v. Penna. Ry. Co., 137 Fed. 343, 70 C. C. A. 23 (1905).

*Ohio.*—State v. Cincinnati, N. O. & T. P. Ry. Co., 47 Oh. St. 130, 23 N. E. 928 (1890).

It should be added that, as the cases go, there is no obligation to provide such special car for a particular shipper, if other cars which are good enough are supplied to him; and where a shipper insists upon peculiar cars in his requisition he may subject himself to longer delays than would have been excusable if he had not thus specified.

tion that wherever the territory served by the railroad produces in sufficient quantities commodities which require special equipment for their proper shipment such equipment should be provided.

### *Topic B. Obligation to Increase Facilities*

**§ 797. Facilities which the service requires.**

In most of the public employments of the modern type what is undertaken is not merely the devoting of particular equipment to public use but rather the rendering of a certain service to the community with which it professes to deal. Thus a modern railroad plainly undertakes general transportation along its route; and since it has professed this general service it must see to it that it has sufficient equipment to handle the business which it has in effect invited by this general profession. The term adequate facilities is not in its nature capable of exact definition.[1] It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the extent of the demand for transportation, and the cost of

*Texas.*—Texas & P. Ry. Co. v. Barrow (Tex. Civ. App.), 77 S. W. 643 (1903).

*Virginia.*—Moore v. Baltimore & O. R. R. Co., 103 Va. 189, 48 S. E. 887 (1904).

And attention should be called to those cases which hold that if the shipper deliberately accepts a car of an inferior sort for his shipment he thereby assumes the risk of losses due to the fact that a car specially adapted for such shipments was not employed.

*Connecticut.*—Coupland v. Housatonic R. R. Co., 61 Conn. 531, 23 Atl. 870, 15 L. R. A. 534 (1892).

*Wisconsin.*—Densmore Commission Co. v. Duluth, S. S. & A. Ry. Co., 101 Wis. 563, 77 N. W. 904 (1899).

[1] The sentence which follows is substantially a quotation from Atlantic Coast Line R. R. Co. v. Wharton, 207 U. S. 328, 28 S. Ct. 121, 52 L. ed. 230 (1907), where the obligation to provide train service was discussed.

See also the language in People v. St. L., A. & T. H. R. R. Co., 176 Ill. 512, 52 N. E. 292 (1898).

furnishing the additional accommodations asked for.[1] All this is particularly true of the municipal services—such as waterworks, gas plants, electric plants, and telephone systems. There are sufficient authorities, most of which have been discussed elsewhere, to the effect that their obligation to give service is not confined to the original pipes which have been laid, or wires which have been strung. Such companies are held to undertake the service of their communities; and they must, to speak in general, be prepared to extend this system throughout their district to meet the reasonable demands of the growing community.[2] If this involves the acquisition of new sources of supply, or a laying of pipes in new streets, or extension of wires to other streets or the construction of new exchanges, all these new facilities must be provided to meet the expansion of the business within the community to the service of which the company has committed itself. But it is true of such supply as it is of other public service that the duty to give adequate service to those to whom it owes this primary duty is relative, not absolute.[3] The

[1] Applying these general principles in a recent case in an action against a carrier for failure to accept property tendered for shipment the court held that as the evidence showed a failure on the carrier's part to provide sufficient stational facilities for taking care of such property awaiting transportation under ordinary conditions, it was no defense that an unusual emergency caused a shortage of cars. St. Louis, I. M. & So. Ry. Co. v. State, 84 Ark. 150, 104 S. W. 1106 (1907).

[2] Speaking generally, such supply companies must keep expanding their facilities to meet the demands of those within the district which they have undertaken to serve.

*Idaho.*—Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518 (1900).

*Oregon.*—Haugen v. Albina Light & Water Co., 21 Oreg. 411, 28 Pac. 244, 14 L. R. A. 424 (1891).

But they need not serve beyond the borders of their defined districts under any circumstances.

*Kansas.*—Crouch v. Arnett, 71 Kan. 49, 79 Pac. 1086 (1905).

*Massachusetts.*—Weld v. Gas & Electric Light Commissioners, 197 Mass. 556, 84 N. E. 101 (1908).

[3] A water company is liable for not

service company will be held to the exercise of due foresight in anticipating the progress of the demand for its supply accompanying the growth of the community. But it will not be liable if the unexpected happens in the shape of an unforeseen demand for which its existing supply is in adequate.

**§ 798. The obligation is not absolute.**

As appears throughout this chapter, at common law this duty is relative not absolute. One is liable for not providing sufficient facilities to meet expected demands, but one is excused where the present demand was fairly unforeseen. There have been in late years many statutes defining this obligation to provide facilities by requiring that cars requested by shippers shall be furnished within a certain number of days. Sometimes these statutes have saving clauses excusing the railroad which is not negligent under the circumstances in failing to provide facilities; and then all is well. But not infrequently the legislation is absolute in its terms; and if this be so one of two things must be done by the courts for the protection of the railroad against such oppressive legislation which is so far from being what was due process of law before. When the Federal courts have come upon such absolute State legislation they have been inclined to deal

sinking more wells to meet the plainly increasing demands of the community. Capital City Water Co. v. State, 105 Ala. 406, 18 So. 62, 29 L. R. A. 743 (1894). But an unusual drought long continuing would excuse a partial suspension of service by a water company. State Trust Co. v. Duluth, 70 Minn. 257, 73 N. W. 249 (1897).

Thus a telephone company is liable for failure to be prepared to render the sort of service the applicant wants. State ex rel. v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870 (1901). But if there have been unusual calls upon its service it is excused for the time being. Cumberland Telephone & Telegraph Co. v. Kelly, 160 Fed. 316 (1908).

uncompromisingly with it, declaring it utterly void.[1] But the State courts have fought to save their statutes, wherever possible, by construing them to intend no more by their general phraseology than the common-law requirements; and wherever, therefore, the company would be excused at common law for not providing facilities, it will be held that the statute has not been violated.[2]

**§ 799. Equipment sufficient for expected business.**

The duty resting upon one engaged in a public service to have at hand sufficient equipment is, to repeat the rule again, relative, not absolute. What the law requires of him is to have sufficient equipment for expected business. Therefore what is required of him by the common law, or by the statutes in definition of it, is to furnish facilities sufficient for the usual course of his business, as far as by ordinary forethought he may anticipate it. There is therefore an established excuse when an unexpected demand renders it impossible to give further service after all his equipment is employed to best advantage.[3]

[1] *United States.*—Houston & T. C. R. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. 491 (1906); St. Louis, I. M. & S. Ry. Co. v. Hampton, 162 Fed. 693 (1908).

*Texas.*—See Texas & P. Ry. Co. v. Allen, 42 Tex. Civ. App. 331, 98 S. W. 450 (1906).

[2] *Arkansas.*—St. Louis S. W. Ry. Co. v. Clay Ginn. Co. 77 Ark. 357, 92 S. W. 531 (1906); St. Louis S. W. Ry. Co. v. Leder, 79 Ark. 59, 95 S. W. 170 (1906); St. Louis, I. M. & S. Ry. Co. v. Wynne H. & C. Co., 81 Ark. 373, 99 S. W. 375 (1907); Oliver v. Chicago, R. I. & P. Ry. Co., 89 Ark. 466, 117 S. W. 238 (1909).

*Georgia.*—Pennington & E. v. Douglass, A. & G. Ry. Co., 3 Ga. App. 665, 60 S. E. 485 (1907).

*North Carolina.*—Hardware Co. v. Railroad Co., 150 N. C. 703, 64 S. E. 873, 22 L. R. A. (N. S.) 1200 (1909).

*Texas.*—B. F. Allen v. Texas & P. Ry. Co., 100 Tex. 525, 101 S. W. 792 (1907).

[3] Leading cases to this effect are:

*Arkansas.*—St. Louis, I. M. & S. Ry. Co. v. Wynne H. & C. Co., 81 Ark. 373, 99 S. W. 375 (1907).

*Georgia.*—Southern Ry. Co. v. Atlanta Sand & S. Co. (Ga.), 68 S. E. 807 (1910).

*Indiana.*—Chicago, St. Louis & P. R. R. Co. v. Wolcott, 141 Ind.

In a recent application of this test [1] in an action against a carrier for failure to furnish freight cars, the evidence showed that there was a shortage in cars by reason of an extraordinary accumulation of freight; that the carrier had seven cars per mile for each mile of its main line and branches, which compared favorably with other carriers in that part of the country; and that in expectation of new business, it had ordered fifteen hundred new freight cars, which it had reasonably thought would be sufficient to handle the business. Upon this showing it was held that the carrier was not liable for its delay caused by the insufficiency of its equipment for handling this unexpected business.

267, 39 N. E. 451, 50 Am. St. Rep. 320 (1894).

*Kansas.*—Udall Milling Co. v. Atchison, T. & S. F. Ry. Co., 82 Kan. 256, 108 Pac. 137 (1910).

*Kentucky.*—Louisville & N. Ry. Co. v. Queen City Coal Co., 99 Ky. 217, 35 S. W. 626 (1896).

*Mississippi.*—Yazoo & M. V. R. R. Co. v. McKay, 91 Miss. 138, 44 So. 780 (1907).

*Missouri.*—Ballentine v. No. Missouri R. R. Co., 40 Mo. 491, 93 Am. Dec. 315 (1867).

*Nebraska.*—State v. Chicago & N. W. Ry. Co., 83 Neb. 518, 120 N. W. 165 (1909).

*New Hampshire.*—Gordon v. Manchester & L. R. R. Co., 52 N. H. 596, 13 Am. Rep. 97 (1873).

*New York.*—Strough v. New York C. & H. R. R. R. Co., 87 N. Y. Supp. 30, 92 N. Y. App. Div. 584 (1904).

*North Carolina.*—Branch v. Wilmington & W. R. R. Co., 77 N. C. 347 (1877).

*South Carolina.*—Mauldin v. Seaboard Air Line Ry. Co., 73 S. C. 9, 52 S. E. 677 (1905).

*Texas.*—Wallace v. Pecos & N. T. Ry. Co., 50 Tex. Civ. App. 296, 110 S. W. 162 (1908).

*Wisconsin.*—Ayres v. Chicago & N. W. R. R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 (1888).

[1] St. Louis S. W. Ry. Co. v. Clay Ginn. Co., 77 Ark. 357, 92 S. W. 531 (1906). See also St. Louis S. W. Ry. Co. v. Leder, 79 Ark. 59, 95 S. W. 170 (1906), and Oliver v. Chicago, R. I. & P. Ry. Co., 89 Ark. 466, 117 S. W. 238 (1909).

But as is noted elsewhere a carrier who has a plain justification for refusing a further application because he is confronted unexpectedly, without his negligence in any respect, by expected demands for his service cannot after he has knowledge of the situation apparently accede to further application, Di Giorgio Importing & S. S. Co. v. Pennsylvania R. R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.)

**§ 800. Expected business not provided for.**

It would seem to be true also, if the press of business might have been provided against by reasonable diligence of the carrier that there is no such excuse.[1] To apply this rule to the transportation of freight, the carrier performs his public duty only by providing for the normal fluctuations in offerings of freight. "The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered." [2]

108 (1906), or actually accept more goods, Helliwell v. Grand Trunk Ry. Co., 7 Fed. 68 (1881), without subjecting himself to liability.

[1] *Arkansas.*—Fordyce v. Nix, 58 Ark. 136, 23 S. W. 967 (1893).

*Georgia.*—Southern Ry. Co. v. Atlanta Sand & S. Co. (Ga.), 68 S. E. 807 (1910).

*Illinois.*—Illinois Cent. Ry. Co. v. Cobb, C. & Co., 64 Ill. 128 (1872).

*Missouri.*—Hoffman H. & S. Co. v. St. Louis, I. M. & S. Ry. Co., 119 Mo. App. 495, 94 S. W. 597 (1906).

*Mississippi.*—Louisville, N. O. & T. Ry. Co. v. Patterson, 69 Miss. 421, 13 So. 697, 22 L. R. A. 259 (1891).

*North Carolina.*—Hansley v. Jamesville & W. R. R. Co., 117 N. C. 565, 23 S. E. 443, 53 Am. St. Rep. 600 (1895).

*South Carolina.*—Porcher v. North Eastern R. R. Co., 14 Rich. L. 181 (1867).

*Texas.*—Galveston, H. & S. A. Ry. Co. v. Morris, 94 Tex. 505, 61 S. W. 709 (1901).

*Wisconsin.*—Ayres v. Chicago & N. W. Ry. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226 (1888).

[2] Fagg, J., in Ballentine v. North Mo. R. R. Co., 40 Mo. 491, 93 Am. Dec. 315 (1867).

There are cases which hold that

**§ 801. Demand foreseen although unusual.**

If, then, the abnormal demand should have been fo seen by a reasonable management it is in default unl it has made every effort to meet the emergency. Thus the conduct of passenger business, when it is known tl some exhibition or other event will bring together a la number of people, the transportation lines should ma seasonable allotment of facilities to meet the extraor nary demand at this point.[1] But if the number of p sengers applying is unprecedentedly large the railroad of course excused if it has provided as much additio service as would seem to be necessary at such a time.[2] recent case goes so far as to hold that if a railroad had r provided sufficient equipment to move the cotton cr each recurring season, a plea in its defense that in t particular season the crop was above average will r save it.[3] And in a still later case it was held that a ra road company which had obligated itself to furnish frigerator cars to transport garden truck to market can escape liability for breach of that duty upon the grou

a passenger on a railroad train, who exhibits his ticket and demands a seat, need not surrender the ticket till the seat is furnished. See Davis v. The Kansas City, St. Joseph & C. B. R. R. Co., 53 Mo. 317, 14 Am. Rep. 457 (1873), and Hardenberg v. St. Paul, M. & M. Ry. Co., 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610 (1888).

But without payment of fare it would seem that he certainly is not entitled to transportation and may be put off. See Pittsburg, C. & St. L. R. R. Co. v. Van Houton, 48 Ind. 90 (1874); Memphis & Charleston R. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. Rep. 776 (1887).

[1] Chicago & A. Ry. Co. v. Dr ser, 161 Ill. 190, 43 N. E. (1896).

See also Trumbull v. Erickson Fed. 891 (1890).

[2] Gordon v. Manchester & L. R. Co., 52 N. H. 596, 13 Am. F 97 (1873).

See also Pursell v. Richmon D. R. Co., 108 N. C. 414, 12 S. 954, 12 L. R. A. 113, and r (1891).

[3] Yazoo & M. V. R. R. Co. Blum Co., 88 Miss. 180, 40 So. 10 L. R. A. (N. S.) 432 (1906).

See also Cronan v. St. L. & S Ry. Co. (Mo. App.), 130 S. W. (1910).

that the crop was unusually large, if it was no larger than might reasonably have been expected from the acreage planted, knowledge of which the railroad company either had, or had the means of obtaining.[1]

**§ 802. Reasonable time to increase facilities.**

When it is said that the company is responsible for not meeting an increase in demand which has been foreseen, this is subject to the qualification that the company shall be given a reasonable time after it should have anticipated the future demands to equip itself for them. And it must be recognized that this is often a matter of considerable time. It is a long time after orders for railroad equipment have been placed before rolling stock, particularly locomotives, is delivered.[2] This point has been well brought out recently in the case of telephone service. When a switch board is full or all the wires in the conduit are exhausted, it is recognized that it will necessarily take considerable time to replace the switch board or introduce new cables.[3]

[1] Atlantic C. L. R. R. Co. v. Geraty, 166 Fed. 10, 91 C. C. A. 602 (1908).

See also Southern Ry. Co. v. Atlanta Sand & S. Co. (Ga.), 68 S. E. 807 (1910).

Telegraph companies must have enough wires to transact all business usually offered to them. Leavell v. Western Union Tel. Co., 116 N. C. 211, 21 S. E. 391, 27 L. R. A. 843, 47 Am. St. Rep. 798 (1895).

[2] See particularly:

*Arkansas.*—St. Louis S. W. Ry. Co. v. Clay Ginn. Co., 77 Ark. 357, 92 S. W. 531 (1906).

*South Carolina.*—Mauldin v. Seaboard Air Line Ry. Co., 73 S. C. 9, 52 S. E. 677 (1905).

In one recent case it was held that mandamus will not issue to compel a railroad company to furnish sufficient motive power and cars to transport freight, since a large discretion in such cases must be left to the management of the road. State ex rel. Ellis v. Atlantic Coast Line Ry. Co., 53 Fla. 650, 44 So. 213 (1907).

[3] See particularly:

*United States.*—Cumberland Telephone & Telegraph Co. v. Kelly, 160 Fed. 316, 87 C. C. A. 268 (1908).

*South Carolina.*—State ex rel. v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870 (1901).

**§ 803. Pressure for short periods.**

It sometimes happens in certain businesses that f short times at recurring intervals there is such extrac dinary demand for service that really sufficient facilit could hardly be provided upon any commercial bas The most striking case of this kind is that of the tracti companies about six o'clock at night. Indeed in the ca of the street car companies it would be physically imp sible to give any headway to sufficient cars to provi seats for all passengers at that hour.[1] All that can expected is the best that expert management can do, a although this will leave passengers standing, it probat cannot be helped in many cases. But sheer physi impossibility need not be shown; commercial imprac cability is enough. Doubtless a granger railroad has every harvest time more demand for grain cars than can instantly supply. But to buy sufficient cars to me every demand the very day it is made, would leave p haps idle during the year ten times the number of ca that the average business demands. This would ine tably react upon the freight rate, increasing it to an u bearable extent. If the management of such a railw provides sufficient cars to move the crop within reasonal time to meet the market, it would seem that it is doing that should be required.[2]

[1] But few seats need be provided in ferryboats, not nearly enough to give all passengers a seat at rush hours. Burton v. West Jersey Ferry Co., 114 U. S. 474, 29 L. ed. 215, 5 Sup. Ct. 960 (1885).

However an ordinance requiring traction lines to provide cars enough so that there will usually be seats at other hours is not unreasonable. North Jersey Street Ry. Co. v. Jersey City, 75 N. J. 349, 67 Atl. 1072 (1907).

[2] See to this effect: State ex v. Chicago, B. & Q. R. R. Co., Neb. 593, 99 N. W. 309 (1904), State ex rel. v. Chicago, B. & Q. R. Co., 72 Neb. 542, 101 N. 323 (1904).

Yazoo & M. V. R. R. Co. Blum, 88 Miss. 180, 40 So. 748, L. R. A. (N. S.) 432 (1906), is

**§ 804. Equipment beyond its control.**

A special problem under this topic, which has come into prominence of late years, is whether a railroad may show as justification for not furnishing cars demanded by its shippers that although it owns freight cars enough to transport the goods which are being offered to it at this time, it happens that so large a per cent of its cars are at the moment away upon other railroads that it is unable to render promptly the service asked. It may seem that the weight of the argument would be against any such justification. A railroad by the common law certainly is not bound to send its cars beyond its own rails; [1] and no legislation has as yet been devised which can constitutionally compel it to do so.[2] It may be argued, therefore, if it has gotten itself into this position by sending its cars elsewhere without being obliged to do so, it could not set up a shortage thus caused as a defense. On the other hand, a railroad may legally enter into a through route, or contract for through shipments, and then in either case it will be obliged to let all patrons who may desire ship through in the original cars.[3] No one doubts that it may properly undertake this additional service to the public if it wishes, and it follows that if it has kept as many cars in hand as it might well feel would be enough

parently *contra*. But Martin v. Gt. Northern Ry. Co., 110 Minn. 118, 124 N. W. 825 (1910), is apparently *accord*.

It is a reasonable rule that no more passengers will be taken into a street car which is overcrowded. Hanna v. Nassau Electric R. R. Co., 18 N. Y. App. Div. 137, 45 N. Y. Supp. 437 (1897).

It is a reasonable decision that a train which is overcrowded shall omit all further scheduled stops to take on passengers. Gordon v. Manchester & L. R. R. Co., 52 N. H. 596, 13 Am. Rep. 97 (1873).

[1] See to this effect: Pittsburg, C. & St. L. Ry. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682 (1878).

[2] See to this effect: Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 29 S. Ct. 246 (1909).

[3] See to this effect: Houston & T. C. R. R. Co. v. Buchanan, 42 Tex. Civ. App. 620, 94 S. W. 199 (1906).

for its local service, it should have the usual justification.[1] But the argument may be carried further. As the railroad business is conducted in the United States the interchange of cars is the regular course of affairs. A railroad which would hold out against this policy would be "an Ishmaelite among its fellows." A traffic manager might therefore well figure upon getting in the course of exchange, under average circumstances, about as many cars as he sends off; but if the conditions of traffic over his own road at the season would usually make the balance of exchange against him or in his favor he should take that into account. It may well be argued that he may take all these facts into account in judging whether he is leaving cars enough for his own business as it would apparently be at this season.[2] But he should also consider the probabilities of his not being able to get back the cars he is sending off.[3]

*Topic C. Establishment of Stational Facilities*

**§ 805. Establishment of stations by legislation.**

It is everywhere agreed that the State may by statute establish stations at places where the public need requires them [4] by special statute. Such legislation is plainly

[1] See to this effect: Missouri, K. & T. Ry. Co. v. Kyser, 38 Tex. Civ. App. 355, 87 S. W. 389 (1905).

[2] See the general language in Midland V. R. R. Co. v. Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380 (1909); Louisville & N. Ry. Co. v. Central S. Y. Co., 30 Ky. L. Rep. 18, 97 S. W. 778 (1906).

[3] See the actual decision in St. Louis S. W. Ry. Co. v. Phœnix Cotton Oil Co., 88 Ark. 594, 115 S. W. 393 (1909); Texas & P. Ry. Co. v. Barrow (Tex. Civ. App.), 94 S. W. 176 (1906).

[4] See for example:

*United States.*—Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 681, 23 L. ed. 291 (1884).

*Arkansas.*—Louisville & A. Ry. Co. v. State, 85 Ark. 12, 106 S. W. 960 (1907).

*Connecticut.*—State of Conn. v. New Haven & N. Co., 37 Conn. 153 (1870).

*Massachusetts.*—Mayor v. Norwich & W. R. R. Co., 109 Mass. 103 (1871).

*New York.*—People v. New York,

within the reserved power of regulation. "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations or do any way business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine; and their determination on this point must be conclusive." [1]

**§ 806. Requirement of stations by commissions.**

The more usual method of exercising the legislative power in this regard is by delegation of the determination of the necessity of the establishment of new stations or the propriety of changing existing stations to the railroad commission. Of the constitutionality of such legislation

L. E. & W. R. R. Co., 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856 (1887).

*Vermont.*—Re Railroad Commissioners, 79 Vt. 266, 65 Atl. 82 (1906).

[1] Per Chapman, C. J., in Commonwealth v. Eastern R. R. Co., 103 Mass. 254, 4 Am. Rep. 555 (1869).

However it was held in Louisiana & A. Ry. Co. v. State, 91 Ark. 358, 121 S. W. 284 (1909), that a special act of the legislature was unreasonable and void, which required the construction and maintenance of a station at a point in a sparsely settled community with meager business interests, which would result in a large expense to the railway company without any corresponding benefit to it or the public.

and the consequent force of such orders there can be no doubt.[1] Indeed many courts believe, as will be seen presently, that without legislative interposition in some form, the railroad companies are forced to do as they please in these respects. Thus in an Alabama case [2] where it was urged in argument that a common-law duty rested on the railroad company to establish and maintain comfortable waiting rooms at its stations, it was said: "An examination of the cases bearing on this question discloses that no such duty exists, unless imposed by the

[1] *United States.*—Minneapolis & St. L. R. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. 396 (1904).

*Alabama.*—Nashville, C. & St. L. Ry. Co. v. State, 137 Ala. 439, 34 So. 401 (1902).

*Kansas.*—Board of R. R. Commrs. v. Missouri Pac. Ry. Co., 71 Kan. 193, 80 Pac. 53 (1905).

*Iowa.*—State v. Des Moines & K. C. Ry. Co., 87 Iowa, 644, 54 N. W. 461 (1893).

*Louisiana.*—Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214 (1902); Louisiana Ry. & Nav. Co. v. Railroad Commission, 121 La. 847, 46 So. 884 (1908).

*Maine.*—Railroad Commissioners v. Portland & O. C. R. R. Co., 63 Me. 269, 18 Am. Rep. 208 (1872).

*Minnesota.*—State ex rel. v. Minneapolis & St. L. R. R. Co., 87 Minn. 195, 91 N. W. 465 (1902); State ex rel. Railroad & W. Commission v. Northern P. R. Co., 90 Minn. 277, 96 N. W. 81 (1903).

*Mississippi.*—State v. Mobile, J. & K. C. Ry. Co., 86 Miss. 172, 38 So. 732 (1905); State v. Yazoo & M. Valley Ry. Co., 87 Miss. 679, 40 So. 263 (1905).

*New Jersey.*—Delaware, L. & W. Ry. Co. v. R. R. Commrs. (N. J.), 74 Atl. 269 (1909).

*New York.*—People v. New York, L. E. & W. R. R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 (1887).

*South Carolina.* — Railroad Commrs. v. A. C. L. R. R. Co., 71 S. C. 130, 50 S. E. 641 (1905).

*South Dakota.*—State ex rel. v. Chicago, St. P. M. & O. Ry. Co., 12 S. D. 305, 47 L. R. A. 569, 81 N. W. 503 (1900).

*Vermont.*—Re Railroad Commrs., 79 Vt. 266, 65 Atl. 82 (1906).

*Wisconsin.*—Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821 (1908).

The action of the commission will not be questioned unless it is acting outside of the jurisdiction conferred upon it by law. People v. President, etc., of D. & H. Canal Co., 165 N. Y. 362, 59 N. E. 138 (1901).

[2] Page v. Louisville & N. R. R. Co., 129 Ala. 237, 29 So. 676 (1898).

charter of the defendant, or by a statutory regulation, or by some other legislative authorization conferring the powers upon a railroad commission to impose the duty."

### § 807. Requirement of stations by the courts: conservative view.

Whether the carrier can be required to establish reasonable stations through judicial process in the courts is a matter of more doubt. The leading authority to the effect that the courts have no jurisdiction to interfere is Northern Pacific Railroad v. Washington Territory *ex rel.* Dustin,[1] a United States Supreme Court case. This was a petition for a mandamus to compel the defendant railroad to erect and maintain a station at Yakima City, through which the road passed. The defendant had at one time stopped its trains at Yakima City, but moved the station to North Yakima. In consequence, apparently, of this, Yakima City which at the time of filing the petition for mandamus, was the most important town in population and business in the county, rapidly dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. The Territorial court granted the writ, but this judgment was reversed on appeal by the Supreme Court of the United States. The decision was thus made in view of the fact that Yakima City had ceased to be a sufficiently considerable place to require station facilities. It is therefore not actually decided in the case that the railroad had not violated its legal duty in failing to stop at Yakima City, or that some form of action might not lie against it for the failure. The court, however, discussed the general question very fully, and concluded that "to hold that the directors of this corporation, in determining the number, place, and size of its

[1] 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. 283 (1892).

stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases." [1]

**§ 808. Progressive view of the question of stations.**

The progressive view of the question is taken in several courts, which allow the writ of mandamus to issue to compel the railroad to establish stations in reasonable places. A leading case is that of the People v. Chicago and Alton Railroad.[2] In that case a petition for a writ of mandamus was granted compelling the defendant to establish and maintain a station at Upper Alton, a town of over 1,800 inhabitants situated on the line of the defendant's railway about midway between two other stations, Mr. Justice Bailey saying: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and

[1] This conservative view prevails at the following jurisdictions:

*United States.*—Atchison, T. & S. F. R. R. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 23 L. ed. 292, 4 Sup. Ct. 185 (1884).

*Alabama.*—Page v. Louisville & Nashville R. R. Co., 129 Ala. 232, 29 So. 676 (1900), *semble.*

*Louisiana.*—State ex rel. v. Kansas City Ry. Co., 51 La. Ann. 200, 25 So. 126 (1899).

*New Jersey.*—Jacquelin v. Erie R. R. Co., 69 N. J. Eq. 432, 61 Atl. 18 (1905), no jurisdiction to prevent discontinuance of station.

*Wisconsin.*—Whiting v. Sheboygan & F. Du Lac, 25 Wis. 167, 3 Am. Rep. 30 (1870).

*England.*—South Eastern Ry. v. Ry. Commrs., 50 L. J. Q. B. 201, 6 Q. B. D. 586, 44 L. T. 203 (1881).

[2] 130 Ill. 175, 22 N. E. 857 (1888).

convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants, and amenable as such." [1]

**§ 809. Where stations are required.**

The circumstances which call for the establishment of stations are brought out in the cases which have been cited. Public necessity is the real basis. Wherever there is a community which has business enough to make the establishment of the station plainly profitable, there can be no doubt that the railroad is acting unreasonably in not establishing a station there.[2] On the other hand, it would be outrageous for the regulating authorities to require a railroad to establish an additional station in a sparsely settled country producing no additional business.[3] Stations, of course, should be more frequent in thickly settled districts; and for a railroad to run through such a country without a station for several miles would be unreasonable.[4] Despite these rules the regulating authorities may go so far as to order the establishing of a

[1] This progressive view prevails in the following jurisdictions:

*Florida.*—Florida, C. & P. R. R. Co. v. State ex rel. Tavares, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30 (1893).

*Illinois.*—Mobile & O. R. R. Co. v. People ex rel., 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556 (1890).

*Nebraska.*—State ex rel. v. Republican Valley R. R. Co., 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424 (1885); Chicago & N. W. Ry. Co. v. State, 74 Neb. 77, 103 N. W. 1087 (1905).

*New Hampshire.*—Concord & M. R. R. Co. v. Boston & M. R. R. Co., 67 N. H. 464, 41 Atl. 263 (1893).

*Washington.* — Northern Pacific R. R. Co. v. Territory of Washington, 3 Wash. Territory, 303, 13 Pac. 604 (1887).

[2] People v. Chicago & A. R. R. Co., 130 Ill. 175, 22 N. E. 857 (1889).

[3] Louisiana & A. Ry. Co. v. State, 91 Ark. 358, 121 S. W. 284 (1909).

[4] Minneapolis, St. P. & S. St. M. Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821 (1908).

station to meet public necessities, although its maintenance may not be profitable.[1]

**§ 810. Closing a station.**

Upon similar principles a station may be closed when public necessity no longer requires it. Thus a station may be abandoned after experience has shown that there is not a sufficient demand for it.[2] The plainest case of the right to close a station is when another station is provided within the same sphere of influence.[3] Thus the shifting of the location of a station from one point in the region to another (where it might originally have been located without objection) is plainly within the discretion of the company.[4] And if the company takes over another parallel road it may close the stations of the acquired line, or of its own line, so long as sufficient accommodations are provided for public convenience.[5] On the other hand, an order of a commission that a station which the railroad is about to abandon shall be kept open will not be considered outrageous, although it would plainly be advantageous to the railroad to close it.[6] And there may be outstanding obligations by legislation or charter, franchise or contract, to maintain the particular station.[7]

[1] See on this crucial point:

*Louisiana.*—Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214 (1902).

*Minnesota.*—State v. Northern Pacific Ry. Co., 90 Minn. 277, 96 N. W. 81 (1903).

*Mississippi.*—Southern Ry. Co. v. State (Miss.), 48 So. 236 (1909).

*Nebraska.*—Chicago, R. I. & P. R. R. Co. v. Nebraska State Ry. Commission, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444 (1910).

*Oklahoma.*—Kansas City, M. & O. Ry. Co. v. State (Okla.), 107 Pac. 912 (1910).

[2] Jacquelin v. Erie R. R. Co., 69 N. J. Eq. 432, 61 Atl. 18 (1905).

[3] Mobile & O. R. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556 (1890).

[4] Chicago & E. I. Ry. Co. v. People, 222 Ill. 396, 78 N. E. 784 (1906).

[5] Chicago & A. R. R. Co. v. People, 152 Ill. 230, 38 N. E. 562 (1894).

[6] Delaware, L. & W. R. Co. v. Railroad Commission (N. J.), 74 Atl. 269 (1909).

[7] State ex rel. v. Northern Pac. Ry. Co., 89 Minn. 363, 95 N. W. 297 (1903).

**§ 811. Exact location of stations.**

Generally speaking the exact location of the station buildings, is for the railroad to decide, and in ordering the establishment of a station the location will be left to its discretion.[1] But there may be cases where but one location is advisable, such as the case of union stations which should be at the railroad intersections. This was the occasion of the most advanced case upon the subject, Concord & Montreal Railroad v. Boston & Maine Railroad [2] where it was held that since "it was conceded that

[1] Florida, C. & P. R. R. Co. v. State ex rel. Tavares, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. Rep. 30 (1893).

However where there are stational facilities at a certain point which the railroad has unreasonably ceased to make a stopping place the regulating authorities will have no hesitation in ordering that particular station to be reopened and service resumed. See in addition the various cases cited in the preceding paragraph. Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821 (1908).

[2] 67 N. H. 464, 41 Atl. 263, 74 N. W. 893, 70 Am. St. Rep. 358, 40 L. R. A. 389 (1893).

But there are several cases which hold that there is no obligation to locate stations at an intersecting point as such.

*United States.*—Atchison, T. & S. F. Ry. Co. v. Denver & N. O. R. R. Co., 110 U. S. 667, 28 L. ed. 291 (1884); Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 53 L. ed. 441 (1909).

*Kentucky.*—Shelbyville R. R. Co. v. Louisville, C. & L. R. R. Co., 82 Ky. 541 (1885).

*Missouri.*—State v. Railroad Co., 105 Mo. App. 207 (1904).

*Virginia.*—See Commonwealth v. Norfolk & W. Ry. Co. (Va.), 68 S. E. 351 (1910).

It would seem that where a railroad terminates upon a wharf upon navigable water, public necessity would require that this should be a public station. See:

*Florida.*—Indian R. S. Co. v. East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258 (1891).

*Georgia.*—Macon, D. & S. R. R. Co. v. Graham, 117 Ga. 555, 43 S. E. 1000 (1903).

But see to the contrary:

*United States.*—Louisville & N. R. R. Co. v. West Coast N. S. Co., 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. 745 (1905); Ilwaco Ry. & N. Co. v. Oregon S. L. & U. N. Ry. Co., 57 Fed. 673, 6 C. C. A. 495 (1893).

*New York.*—Alexandria Bay Stb. Co. v. New York C. & H. R. R. R. Co., 45 N. Y. Supp. 1091, 18 N. Y. App. 527 (1897).

the public good requires that there should be a union passenger station in the city of Manchester, to be used by the railroads connecting at that point, for the accommodation of the public as well as for their own convenience and advantage, from this concession it necessarily follows that it is the legal duty of the parties to locate, erect, and maintain such a depot as public necessity requires which the court might designate if the parties were unable to agree." A problem as to which there is much litigation arises when a covenant by a railroad with a landowner as to the exact location of stations is brought to court. A mere stipulation that a certain station shall be maintained, the railroad being free to open others, is not necessarily void.[1] But a condition, that no other station shall be maintained than the one erected upon the land conveyed, is void, as public policy requires that the railroad should be free to open stations wherever public convenience requires.[2]

## § 812. Proper facilities at stations.

A stopping place does not necessarily involve station buildings;[3] but at common law the duty of the railroad

[1] *Illinois.*—Lyman v. Suburban R. R. Co., 190 Ill. 320, 60 N. E. 515, 52 L. R. A. 645 (1901).

*Indiana.*—Cleveland, C., C. & I. Ry. Co. v. Coburn, 91 Ind. 557 (1883).

*Iowa.*—First Nat'l Bk. v. Hendrie, 49 Iowa, 402, 31 Am. Rep. 153 (1878).

*Pennsylvania.*—Cumberland V. Ry. Co. v. Baab, 9 Watts. 458, 36 Am. Dec. 132 (1840).

*Wisconsin.*—Horner v. Chicago, M. & St. P. Ry. Co., 38 Wis. 165 (1875).

[2] *Illinois.*—St. Louis, J. & C. R. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122 (1874).

*Iowa.*—Williamson v. C., R. I. & P. R. Co., 53 Ia. 126, 4 N. W. 870, 36 Am. Rep. 206 (1880).

*Kansas.*—St. Joseph & Denver City R. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357 (1873).

*Massachusetts.*—See Fuller v. Dame, 18 Pick. 472 (1836).

[3] In Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821 (1908), it was held sufficient to maintain a mere platform. Such platforms are

would undoubtedly go so far as to make it negligent in not providing adequate buildings at stations where much business is done.[1] Certainly it must keep its station buildings up to the requirements of the business existing. One of the matters which is coming within the jurisdiction of railroad commissions is the requirement of proper station buildings where it deems them requisite; and even the ordering of minor improvements in existing stations. By these principles a regulation of a railroad company is unreasonable and void under which the sale of tickets to any regular station of a train is refused, or by which, although a passenger holding a through ticket may himself get off at any such station, he is not permitted also to remove his baggage.[2] On the other hand, railroads need not make provisions for passengers entering or leaving cars at unexpected and unusual places.[3]

## § 813. Establishment of freight stations.

All the law discussed in this topic is as applicable to freight stations as to passenger stations. The true issue,

not stations within the meaning of statutes referring to stations. Kellogg v. Suffolk & C. Ry. Co., 100 N. C. 158, 5 S. E. 379 (1888).

On the other hand, in St. Louis, I. M. & So. Ry. v. State, 84 Ark. 150, 104 S. W. 1106 (1907), the decision based upon the existence of the duty to provide proper freight houses for the receiving of freight awaiting transportation. And this duty was recognized in another recent case where the building of a grain elevator by a railroad was held permissible to this extent. People ex rel. v. Illinois Central R. R. Co., 233 Ill. 378, 84 N. E. 368, 116 L. R. A. (N. S.) 604, 122 Am. St. Rep. 181 (1908).

*Louisiana.*—Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 247, 33 So. 214 (1902).

*Missouri.*—Lackland v. Chicago & A. Ry. Co., 101 Mo. App. 420 (1903).

[1] *Missouri.*—Eichorn v. Missouri, K. & T. Ry. Co., 130 Mo. 575, 32 S. W. 993 (1895).

*South Dakota.*—State v. Chicago, St. P., M. & O. Ry. Co. (S. D.), 81 N. W. 503 (1900).

[2] Pittsburg, C. & St. L. Ry. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607, 10 Am. St. Rep. 517 (1888).

[3] Central R. R. Co. v. Smith, 76 Ga. 209, 2 Am. St. Rep. 31 (1886).

as has been said, is whether the existing freight stations are so situated as to meet the reasonable demands of shippers from that district, and is not whether the freight business that probably will be offered at the place proposed for a new station is enough to justify the requirement of the new station.[1] Indeed in large cities the passenger stations may be in one district, while the freight terminals may properly be in another.[2] Moreover freight stations may be specialized, some for the reception of package freight, others for bulk freight.[3] And a railroad may have cattle stations and mineral stations, for example, or special sidings for the reception of special freight.[4] But if the business will not justify this differentiation it may concentrate all at one point with appropriate premises properly equipped.

**§ 814. Establishing offices in other services.**

This law is applicable to other services besides carriage.

[1] People v. Delaware & H. Canal Co., 52 N. Y. Supp. 850, 32 App. Div. 120 (1898).

[2] Maintaining a special freight station at a terminal city while merely side tracking cars at a way station is justifiable. Michie v. New York, N. H. & H. R. Co., 151 Fed. 694 (1907).

[3] This matter of the establishment of separate stations for special freight should obviously be left almost entirely to the discretion of the company. The cases thus far hold simply that the company may do so. Robinson v. Baltimore & O. Ry. Co., 129 Fed. 753, 64 C. C. A. 281 (1904).

See further Harp. v. Choctaw, O. & G. R. R. Co., 125 Fed. 445, 61 C. C. A. 405 (1903), going to the extreme of holding that coal in bulk need not be taken except from the shipper's tipple.

[4] Thus the cases permit the railroad to compel cattle to be handled through a stock yard station—but it may not make a special charge for terminal facilities. Covington S. Y. Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. 461 (1891); but see Central S. Y. Co. v. Louisville & N. Ry. Co., 192 M. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339 (1904).

But the cases as to providing facilities for handling cattle only require that proper equipment must be provided at regular stations. See Missouri, K. & T. Ry. Co. v. Byrne, 100 Fed. 359, 40 C. C. A. 402 (1900), and Flint v. Boston & M. R. R. Co., 73 N. H. 141, 59 Atl. 938 (1905).

The location of telegraph offices for example, is plainly subject to similar principles. While these must be established at reasonable intervals, their establishment is within the discretion of the company. These offices may be closed if experience shows that they are not required, and their location may be shifted later, unless the change is distinctly contrary to the interests of the public served.[1] Courts would always hesitate to give orders in regard to these matters on their own initiative, and some would refuse altogether. But the orders of proper authorities must be respected unless obedience would mean practical confiscation.[2] All this is doubtless true of the pay stations of a telephone company, although, there is not much by way of judicial opinion as yet.

*Topic D. Provision of Private Installation*

**§ 815. No right to private sidings generally.**

The general rule as has just been seen is that those having freight to ship must bring it to the regularly established freight stations, just as travelers wishing to be transported must present themselves at the regularly established passenger stations. At common law no shipper or consignee of ordinary freight, no matter how large the business which he does with the railroad may be in the aggregate, has any right to have freight trains stopped at his premises or freight cars spotted at his siding, even if his premises abut upon the right of way or he has constructed a siding to the railroad grade ready for connection with the through tracks.[3] Even if a patron is enjoying the

[1] *Kansas.*—State v. Western Union Telegraph Co., 75 Kan. 609, 90 Pac. 299 (1907).

*North Carolina.*—Railroad Commissioners v. Western Union Telegraph Co., 113 N. C. 213, 18 S. E. 389 (1893).

[2] *Mississippi.* — Western Union Telegraph Co. v. Mississippi R. R. Commission, 74 Miss. 80, 21 So. 15 (1896).

*Ohio.*—Railroad Co. v. Telegraph Co., 38 Ohio St. 24 (1882).

[3] *United States.*—Bedford B. G. S. Co. v. Oman, 134 Fed. 441 (1904).

privilege of having cars left upon a siding for him and taken away when loaded, the railroad may discontinue this service on short notice.[1] Indeed since there is no duty in the matter it is not discrimination to permit one shipper to have a private switch while others similarly situated are not allowed the same privilege.[2] What has been said in this paragraph does not apply to the peculiar case of the terminal railroad as the peculiar business of such railroads is to switch loaded cars to and from sidings.[3]

**§ 816. Rights of the railroad paramount.**

It is certainly true that under no circumstances can anyone insist that there shall be a switch connection, when it would interfere with the business of the railroad if there should be such an intermediate switch at that point.[4] So the railroad is excused in all cases where it appears that there would be danger in maintaining the

[1] Durden v. Southern Ry. Co., 2 Ga. App. 66, 58 S. E. 299 (1907).

[2] Cedar Rapids & I. C. Ry. & L. Co. v. Chicago, R. I. & P. R. R. Co. (Iowa), 124 N. W. 323 (1910).

[3] Interstate Stock Yards Co. v. Indianapolis U. Ry. Co., 99 Fed. 472 (1900).

It does not subject a railroad company to indictment under the Interstate Commerce Act for it to refuse to furnish a switch connection to a shipper tendering interstate traffic for transportation, although such connections are furnished to other shippers, especially where the indictment does not charge that the connections demanded are reasonably practicable and could be put in with safety and would furnish sufficient business to justify the expense of their construction and maintenance, nor that the person or company asking for the same offered to pay such portion of the cost as is usual and reasonable. United States v. Baltimore & O. R. Co., 153 Fed. 997 (1907).

An order of the Interstate Commerce Commission which forbids a carrier to allow or pay to the owner of an elevator any compensation for elevation in transit of grain which he ships, unless he refuses to clean, clip, mix, inspect or grade the grain while it is passing through the elevator, is beyond its powers. Peavey & Co. v. Union Pac. Ry. Co. 176 Fed. 409 (1910).

[4] Jones v. Newport, N. & M. V. Co., 65 Fed. 736, 31 U. S. App. 92, 13 C. C. A. 95 (1895), switch connection at dangerous point from the operating point of view.

switch service desired.[1] However, evidence on behalf of the applicant for a switch, that a few years before the defendant railroad had maintained a side track at this point for two years without any inconvenience or accident resulting is competent to show the practicability of a side track being continued at this point.[2] Upon similar principles it has been held that wherever a railroad has been delivering freight of a certain class for certain shippers at certain places beside its track that have been designated, it may be considered as professing to do so and it cannot then refuse in a particular case on the ground that it is impracticable.[3]

## § 817. When private switches must be granted.

On the other hand there are exceptional businesses where the commercial necessity for private switches is recognized by the common law to be overruling.[4] This is

[1] Mercantile Trust Co. v. Columbus, S. & H. R. R. Co., 90 Fed. 148 (1898), siding itself in dangerous condition.

[2] Industrial Siding Case, 140 N. C. 239, 52 S. E. 941 (1905).

See also St. Louis, I. M. & S. Ry. Co. v. Wynne, H. & C. Co., 81 Ark. 373, 99 S. W. 375 (1907).

[3] State ex rel. Ellis v. Atlantic, C. L. R. Co., 52 Fla. 646, 41 S. O. 705 (1906); Cumberland Tel. & Tel. Co. v. Morgan's L. & T. Ry. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442 (1899), *accord.*

[4] *United States.*—Harp v. Choctaw, O. & G. R. R. Co., 125 Fed. 445, 61 C. C. A. 405 (1903), collieries; Olanta Coal M. Co. v. Beech Creek R. R. Co., 144 Fed. 150 (1906), collieries.

*Illinois.*—Vincent v. Chicago & A. R. R. Co., 49 Ill. 33 (1868), grain elevators; Chicago & N. W. Ry. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690 (1870), grain elevators.

*Kentucky.*—Bedford-Bowling Green Stone Co. v. Oman, 115 Ky. 369, 73 S. W. 1038 (1903), quarries.

*Iowa.*—Richmond v. Dubuque & Sioux City R. R. Co., 26 Iowa, 191 (1868), grain elevators.

*Louisiana.*—Cumberland Tel. & Tel. Co. v. Morgan's L. & T. R. R. Co., 51 La. Ann. 29, 24 So. 803, 72 Am. St. Rep. 442 (1889), *semble*, timbers.

*Nebraska.*—Roby v. State ex rel. Farmers' G. & L. S. Co., 76 Neb. 450, 107 N. W. 766 (1906), grain elevators.

*Pennsylvania.*—Continental Coal Co. v. Pennsylvania R. R. Co., 13 Pa. Dist. Ct. 702 (1904), collieries.

peculiarly true of those who ship or receive freight in bulk. Thus private switches should be permitted at grain elevators, coal tipples, ore smelters, and oil tanks, provided the shipments from them are of reasonable size. And the same is true of those who are shippers and receivers in considerable quantities of such freight as it would be actually impracticable or peculiarly disadvantageous to transport by teams over the roads. Examples of this would be iron castings and heavy machinery, blocks of marble and great timbers. As Mr. Justice Baxter said, in discussing this whole question in Coe v. Louisville & Nashville Railroad Company:[1] "This rule is just and convenient, and necessary to an expeditious and economical delivery of freights. It has regard to their proper classification, and to the circumstances of the particular case. Under it articles susceptible of easy transfer may be delivered at a general delivery depot provided for the purpose. But live stock, coal, ore, grain in bulk, marble, etc., do not belong to this class. For these some other and more appropriate mode of delivery must be provided."

**§ 818. The problem of stock yards.**

In the quotation just given live stock was included among the bulky articles which a carrier must receive and deliver beside its track. This is apparently not law now. The cost of transporting live stock through a town to a single station is not prohibitive, since the animals go on their own legs. It is therefore permissible for the carrier to establish a single station for the reception of live stock, provided such a station is properly equipped for the purpose and furnishes sufficient facilities for the neighborhood. Consequently it is now held that there is no duty owed to the owner of cattle to make special delivery of them at any place along the line that he designates. On the

[1] 3 Fed. 775 (1880).

contrary it is held that the railroad may designate certain points of delivery if reasonably convenient, as it may for other freight which it has undertaken to carry. Upon this basis the courts have permitted the railroad to designate one of several private stock yards as its cattle station where it will deliver cattle consigned to that point and have accordingly justified it in refusing to deliver at other stock yards.[1] This was well enough so long as the courts held strictly that no charge could be made under such circumstances for yardage if the consignee was ready to take the cattle away.[2] Under a late decision the United States Supreme Court has permitted a stock yards company to make an additional charge as a connecting carrier.[3] But in the latest Supreme Court case it is held that the railway may make connections with the trackage of one stock yard while refusing to make such connection with another.[4]

### § 819. Constitutionality of further legislation.

Legislation along these lines has become somewhat common, as indeed it has become generally in relation to the provision of facilities. Legislation is not so unreasonable as to be unconstitutional if it ignores the common law distinction between movable and immovable freights which has just been discussed.[5] Thus a railroad

[1] Butchers & D. S. Y. Co. v. Louisville & N. R. R. Co., 67 Fed. 35, 14 C. C. A. 290 (1895); Walker v. Keenan, 73 Fed. 758, 19 C. C. A. 668 (1896).

[2] Covington S. Y. Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. 461 (1891).

[3] Interstate Commerce Comm. v. Chicago, B. & Q. R. R. Co., 186 U. S. 320, 46 L. ed. 1182, 22 Sup. Ct. 824 (1902).

[4] Louisville & N. R. R. Co. v. Central S. Y. Co., 212 U. S. 132, 53 L. ed. 441, 29 S. Ct. 246 (1909). See also Central S. Y. Co. v. Louisville & N. Ry. Co., 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. 339 (1904).

[5] This is assumed in Mays v. Seaboard Air Line Ry. Co., 75 S. C. 455, 56 S. E. 30 (1906).

commission may be given power to give orders for the installation of switches or to prohibit the removal of private switches where the commercial necessity for them sufficiently appears.[1] There is the possibility that an order of the commission for the establishment of a switch connection may be held outrageous if it would interfere too much with the business of the railroad.[2] But certainly legislation can confirm the right of shippers of bulky freights to have switch connections.[3]

**§ 820. Railroad never obliged to construct siding.**

The extent to which such legislation in regard to sidings may go has been under examination in several recent cases both State and Federal. These cases establish beyond question that the utmost extent to which the duty may be pressed is to permit the making of the switch connection. Neither the legislature nor its commission can compel the railroad to construct the sidings at its own expense, as was pointed out in one of the recent State cases.[4] And therefore a statute was recently held unconstitutional by a State court which although requiring the individual to build provided that he should be repaid that cost by a reduction of twenty per cent from his freight bills for each year.[5] Two cases finally reaching the United States Supreme Court settled this side of the general problem for the Federal courts. In the earlier case [6] a Nebraska statute requiring every railroad to permit all those who

[1] For example, see Railroad Commission of La. v. Kansas City So. Ry. Co., 111 La. 133, 35 So. 487 (1903).

[2] This is assumed in the Industrial Siding Case, 140 N. C. 239 (1905).

[3] For example, see Olanta Coal M. Co. v. Beech Creek R. R. Co., 144 Fed. 150 (1906).

[4] Northwestern Warehouse Co. v. Oregon Ry. & Nav. Co., 32 Wash. 218, 73 Pac. 388 (1903).

[5] Mays v. Seaboard Air Line Ry. Co., 75 S. C. 455, 56 S. E. 30 (1906).

[6] Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 403 (1896).

desired to build a grain elevator upon the right of way of a railroad was held to deprive the company of its property without due process of law. In the later case [1] the Nebraska statute as amended permitting the railroad to refuse to grant a location if it would construct a siding to any elevator established on land adjoining its right of way was held unconstitutional as compelling the railroad to pay for a private facility.

**§ 821. Duty confined to permitting connection.**

At common law the duty of the railroad as a carrier of freight is confined to taking up or setting down freight along its route, or more exactly beside its tracks as constructed. The most that the common law requires of a railroad in any case is to receive or leave cars at the point where the spur constructed by the shipper comes upon the right of way of the railroad. Doubtless the railroad must put in the switch itself, and certainly it can decide upon the details of its location. As to the matter of operation, the railroad must plainly move the car on and off the switch, since it would not permit the shipper to break in upon its own operation over its public tracks. But certainly as a common law matter the railroad cannot be

[1] Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196 (1910).

A contract between two railroad companies providing for the construction of a spur track to a customer and the switching of cars over the same for a specified charge has been held not to violate the Interstate Commerce Act, it not appearing that any discrimination was made against other customers seeking to have like privileges. Cedar Rapids & I. C. Ry. & Light Co. v. Chicago, R. I. & P. Ry. Co. (Iowa), 124 N. W. 323 (1910).

But in Chesapeake & O. Ry. Co. v. Standard Lumber Co., 174 Fed. 107, 98 C. C. A. 81 (1909), it was held that refunding to a certain shipper ten per cent of his freight bills until his expenditures in constructing his siding and its equipment were paid for constituted a violation of the Interstate Commerce Act, although the siding and its equipment were thus to become the property of the railroad.

compelled to perform the shunting service over the private spur of the shipper, as it cannot be compelled to haul beyond its own rails.[1] On the other hand if it undertakes such service generally it must apparently perform the service for all shippers indifferently at reasonable rates.[2] As this is so close a question it is probable that a legislative requirement or a commission ruling requiring such service would not be outrageous. And there are cases enough that show that when the service is undertaken the charges for switching can be regulated and discrimination in them forbidden.

### § 822. Obligation to receive upon spurs.

Another distinction remains, which may explain much. Public spurs which are really part of the railroad's trackage and operated as such should be distinguished from special sidings which are the private property of individual shippers. A railroad in operating a public lateral must deal with all shipments offered or consigned to it without discrimination. It may not treat one patron located upon it differently from another.[3] On the other hand the owners

[1] Brooks Mfg. Co. v. Southern Ry. Co. (N. C.), 68 S. E. 243 (1910).

[2] Missouri Pac. Ry. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214 (1909).

[3] *Alabama.*—Agee & Co. v. Louisville & N. Ry. Co., 142 Ala. 344, 37 So. 680 (1904).

*Georgia.*—Butler v. Tifton, T. & G. R. R. Co., 121 Ga. 817, 49 S. E. 763 (1904).

*Illinois.*—Chicago & A. R. R. Co. v. Suffern, 129 Ill. 274, 21 N. E. 824 (1889).

*Kentucky.*—Louisville, etc., R. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601 (1901).

*Louisiana.*—Kansas City, S. & G. Ry. Co. v. Louisiana, etc., Ry. Co., 116 La. 178, 40 So. 627, 5 L. R. A. (N. S.) 512 (1905).

*Minnesota.*—State ex rel. R. & W. Com. v. Willmar & S. F. R. Ry. Co., 88 Minn. 448, 93 N. W. 112 (1903).

*Nebraska.*—Roby v. State ex rel. Farmers' G. & L. S. Co., 76 Neb. 450, 107 N. W. 766 (1906).

*New York.*—Kellogg v. Sowerby, 87 N. Y. Supp. 412, 93 App. Div. 124 (1904).

*South Carolina.*—Avinger v. South Carolina Ry. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716 (1888).

of a private siding may refuse to let any other shipper utilize it.[1] This distinction is well brought out by two cases both involving one Oman and the Bedford-Bowling Green Stone Company. In the earlier case in the Kentucky court [2] it appeared that the siding had been constructed by the railroad which still owned some of the abutting lands and it was held that freight must be accepted from the complainant if tendered on these lands. In the later case [3] in the Federal courts it transpired that the railroad in the interval had sold the trackage and all the adjoining lands to the favored concern; and the court thereupon felt constrained to hold that this was a private switch upon which no one else but the owner had any right to be offering freight.

### § 823. The company need only provide requisite facilities.

It may seem an obvious proposition that the company need only provide the facilities requisite for giving the service it is under obligation to provide. And yet in its application this is not a matter free from difficulty when the limits of the doctrine are approached. In the case of the carrier of passengers for example, it is plain that the railroad must provide a safe and comfortable car. It

*Texas.*—Railroad Commissioners v. St. Louis & S. W. Ry., 80 S. W. 102 (1904).

[1] See particularly:

*Arkansas.*—Edgar Lumber Co. v. Cornie Stave Co., 130 S. W. 452 (1910).

*Michigan.*—Mann v. Pere Marquette R. R. Co., 135 Mich. 210, 97 N. W. 721 (1903).

[2] Bedford-Bowling Green Stone Co. v. Oman, 115 Ky. 369, 73 S. W. 1038 (1903).

[3] Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. 441 (1904).

This of course means that a siding may always be abandoned.

*United States.*—Mercantile Trust Co. v. Columbus, S. & H. R. R. Co., 90 Fed. 148 (1898); Jones v. Newport News & M. V. R. R. Co., 13 C. C. A. 95, 65 Fed. 736, 31 U. S. App. 92 (1895).

*Georgia.*—Durden v. Southern Ry. Co., 2 Ga. App. 66, 58 S. E. 299 (1907).

must even see to the provision, upon a long journey, of facilities for eating and sleeping,[1] but it does not have to provide overcoats and toothbrushes. In the case of the municipal services the supplying company must, of course, construct the necessary plant; the electric company must supply its station, and the gas company must construct its retorts. The supply wires of the electric company and the street mains of the gas company, it is plain, are in the same category. On the other hand the electroliers and chandeliers as well as the bulbs and burners are provided by the consumer.[2] Of course it is all a question of degree, the test being in any particular case what is the usual undertaking of the company engaged in that business as it is conducted. A telephone company for example, need provide at the regular rate only the necessary facilities for speaking and hearing; it need not provide additional equipment.[3] A turnpike company, at the other extreme, provides nothing but an open road, the customer furnishing his own vehicles.[4]

**§ 824. Provision of service pipes and feed wires.**

In regard to the supply services, there is, however, a debatable ground between these extremes. For example it is not settled whether a water company is obliged to lay and pay for the service pipes from the street mains to the premises of the consumer, or whether the consumer

[1] See for example: Peniston v. Chicago, St. L. & N. O. R. R. Co., 34 La. Ann. 777, 44 Am. St. Rep. 444 (1882), responsibility for approaches to eating houses.

[2] See for example: Snell v. Clinton Electric L. H. & P. Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284 (1902), no concern with the interior electric fittings.

[3] See Chesapeake & P. Telephone Co. v. Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144 (1902), such as telephone cabinets and extension sets.

[4] See Downing v. Mt. Washington Road Co., 40 N. H. 230 (1860), ultra vires for turnpike company to run stage line over it.

himself must pay for the service pipes. There are some cases which are positive that the company should lay the service pipe and make the necessary connections at its own expense.[1] It is well argued in these cases that the main and all laterals, fixtures and connections to the franchise limit of the lot line belong to the company, and altogether constitute the water system. It does not seem to be the business of the consumer to construct any part of the company's system, any more than it is the company's business to place the pipes and fixtures in the consumer's premises. On the other hand there is as much authority, if not more, to the effect that the requirement by legislation or even by the regulation of the company that the consumer shall pay for his service pipe is not outrageous, as this installation is peculiarly for his benefit and no part of the general facilities of the system in the use of which all share to some degree.[2] This argument will also apply to gas supply; and obviously that case is correct which holds in effect that the gas company has no obligation with regard to rising pipes within the building.[3] Upon similar principles an electric company has nothing to do with the interior wiring.[4]

[1] *Idaho.*—Hatch v. Consumers' Co., 17 Idaho, 204, 104 Pac. 670 (1909); Pocatello Water Co. v. Standley, 7 Idaho, 155, 61 Pac. 518 (1900); Bothwell v. Consumers' Co., 13 Idaho, 568, 24 L. R. A. (N. S.) 485, 92 Pac. 533 (1907).

*New York.*—Alvord v. Syracuse, 163 N. Y. 158, 57 N. E. 310 (1900).

*Texas.*—International Water Co. v. El Paso (Tex. Civ. App.), 112 S. W. 816 (1908).

[2] *Illinois.*—Prindiville v. Jackson, 79 Ill. 337 (1875); Warren v. Chicago, 118 Ill. 329, 9 N. E. 883, 11 N. E. 218 (1887); Palmer v. Danville, 154 Ill. 156, 38 N. E. 1067 (1894).

*North Dakota.*—Jackson v. Ellendale, 4 N. D. 478, 61 N. W. 1030 (1894).

*Wisconsin.*—Gleason v. Waukesha County, 103 Wis. 225, 79 N. W. 249 (1899).

[3] Ferguson v. Metropolitan Gas Light Co., 37 How. Pr. 189 (1868).

[4] Snell v. Clinton Electric L. H. & P. Co., 196 Ill. 626, 63 N. E. 1082, 89 Am. St. Rep. 341, 58 L. R. A. 284 (1902).

Where a city, operating a system of waterworks furnishing water to

## § 825. Provision of transformers and meters.

Must the electric company provide a transformer, or the gas company supply a meter? There are conflicting decisions as to this matter. In the case of the transformer it was apparently held in a recent case [1] that the provision of a transformer was involved in the service proposed; and this is believed to be sound because it would seem that the electric company must provide all facilities necessary for delivering current to the consumer.[2] However, there are various cases as to meters which hold that the supplying company can compel the consumer to provide his own meter, or pay rental, as such, for the meter provided by the company.[3] But by other, and it is believed better, authorities it is held improper for the supplying company to compel the consumer to provide a meter, or to charge meter rent as such.[4] Many of the former cases,

its citizens, controlled the cock at the junction of service pipes and the main pipe, by which water was let on and off, it must remove an obstruction therein within a reasonable time. City of Jackson v. Anderson (Miss.), 51 So. 896 (1910).

[1] Snell v. Clinton Electric Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341 (1902).

[2] The cost of the transformer may be taken into account in determining the minimum charge against the particular consumer. Gould v. Edison Electric Co., 29 N. Y. Misc. 241, 60 N. Y. Supp. 559 (1899).

[3] *California.*—Smith v. Capital Gas Co., 132 Cal. 209, 64 Pac. 258, 54 L. R. A. 769 (1901), regulation.

*Kansas.*—Cooper v. Goodland, 80 Kan. 121, 102 Pac. 244, 23 L. R. A. (N. S.) 410 (1909), ordinance.

*Illinois.*—Anderson v. Village of Berwyn, 135 Ill. App. 8 (1907), ordinance.

*Massachusetts.*—Shaw Stocking Co. v. Lowell, 199 Mass. 118, 85 N. E. 90, 18 L. R. A. (N. S.) 746 (1908).

*Missouri.*—Mallon v. Board of Water Commrs., 144 Mo. App. 104, 128 S. W. 764 (1910), municipal charter.

*New York.*—Hill v. Thompson, 18 Jones & S. 165 (1884), statute; Swanberg v. New York, 123 App. Div. 774, 108 N. Y. Supp. 364 (1908), municipal supply.

*Wisconsin.*—State ex rel. v. Gosnell, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33 (1903), ordinance; State ex rel. v. Manitowoc Waterworks Co., 114 Wis. 487, 90 N. W. 442 (1902), regulation.

[4] *Alabama.*—Smith v. Birmingham Waterworks Co., 104 Ala. 315, 16 So. 123 (1893).

however, really go no further than to hold that when this requirement is imposed upon customers by legislation or regulation, this policy is not so unreasonable as to be invalid. Others of them hold that if the consumer wishes the privilege of getting by measure instead of by estimate he must furnish the meter. Few cases of these cited would go so far as to permit the company to force a measured taking upon a consumer against his will and make him pay for the meter. As to these typical municipal services, the writer is rather inclined to go to some length in favor of the consumer, insisting that the supply company should deliver to him what is sold, usable electricity at the house, measured gas at the cellar. These companies are engaged in a public service, and all the equipment necessary to perform that service, it would seem, should be provided by the supply company, within reasonable limits. This may involve a larger capitalization; but that is not sufficient reason in itself why the public company should not provide all equipment necessary to give the service offered. On the other hand, it may be argued fairly enough, that if the company provides all the facilities which are for the service of the whole public, such as the street mains, the separate takers may not unreasonably be obliged to provide their individual installation.

*Arkansas.*—Wilson Water & Elec. Co. v. Arkadelphia, 129 S. W. 1091 (1910).

*Kentucky.*—Capital Gas & Elec. L. Co. v. Gaines, 20 Ky. L. R. 1464, 49 S. W. 462 (1899). See also Louisville Gas Co. v. Dulaney & Alexander, 100 Ky. 405 (1897).

*Missouri.*—State ex rel. v. Sedalia Gaslight Co., 34 Mo. App. 501 (1889).

*Nebraska.*—Albert v. Davis, 49 Neb. 579, 68 N. W. 945 (1896).

*New Jersey.*—Red Star Steamship Co. v. Jersey City, 45 N. J. L. 246 (1883).

*New York.*—Buffalo v. Buffalo Gas Co., 81 App. Div. 505, 80 N. Y. Supp. 1093 (1903).

*Texas.*—Walker v. McDonald, 49 Tex. 458 (1878).

**§ 826. Dictation as to fittings.**

It would seem to follow that where the obligation of the company to provide facilities ceases, its right to dictate to its patron as the character of his own facilities would also cease. And this, indeed, is the general principle. This will often be found to be modified by the right of the company to protect its own interests, when these are involved. Thus a gas company may regulate the placing of governors upon his pipes by the owner himself if there is danger that their operation may affect the operation of the meter; but its right to interfere cannot go further than this.[1] Surely an electric company cannot give orders to its customers as to the fittings they shall use, unless they might be of such a construction as to interfere with its circuits.[2] It should be noted in connection with all of these cases that where the service company makes a regulation as to the fittings to be used, it will be supported unless plainly outrageous. Thus the cases as to water companies hold that they may by regulation determine what style of shut-off hydrant shall be used.[3] This is particularly true as has been seen in telephone service where a regulation forbid-

[1] It may regulate the placing of governors and mixers. Blondell v. Consolidated Gas Co., 89 Md. 732, 43 Atl. 817 (1899). But not prohibit them altogether. Indiana Natural & Illuminating Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868 (1900).

[2] Thus it may not insist that the wiring shall be done by its own department. Snell v. Clinton Electric L. H. & P. Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341 (1902). But it can refuse to supply electricity to premises dangerously wired. Benson v. American Illuminating Co., 102 N. Y. Supp. 206 (1907).

[3] State ex rel. v. Goodfellow, 1 Mo. App. 495 (1876).

Thus an applicant for service may be required to present a certificate from a reputable plumber that his interior installation has been properly made. State ex rel. v. New Orleans Gaslight Co., 108 La. 67, 32 So. 179 (1902). But it would be unreasonable for a company to insist that certain plumbers should be employed. Franke v. Paducah Water Supply Co., 88 Ky. 467, 11 S. W. 432, 4 L. R. A. 265 (1889).

ding the attachment of devices to the instruments supplied is held reasonable.[1]

[1] Gardner v. Providence Telephone Co., 23 R. I. 312, 50 Atl. 1014, 23 R. I. 262, 49 Atl. 1004, 55 L. R. A. 113 (1901).

Where in the franchise of a telephone company it was provided that it should furnish service at a certain rate, provided the subscribers furnished their own instruments, the company was held nevertheless entitled, if it so desired, to furnish its instruments making no extra charge therefor. Wright v. Glen Telephone Co., 112 App. Div. 745, 99 N. Y. S. 85 (1906).

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